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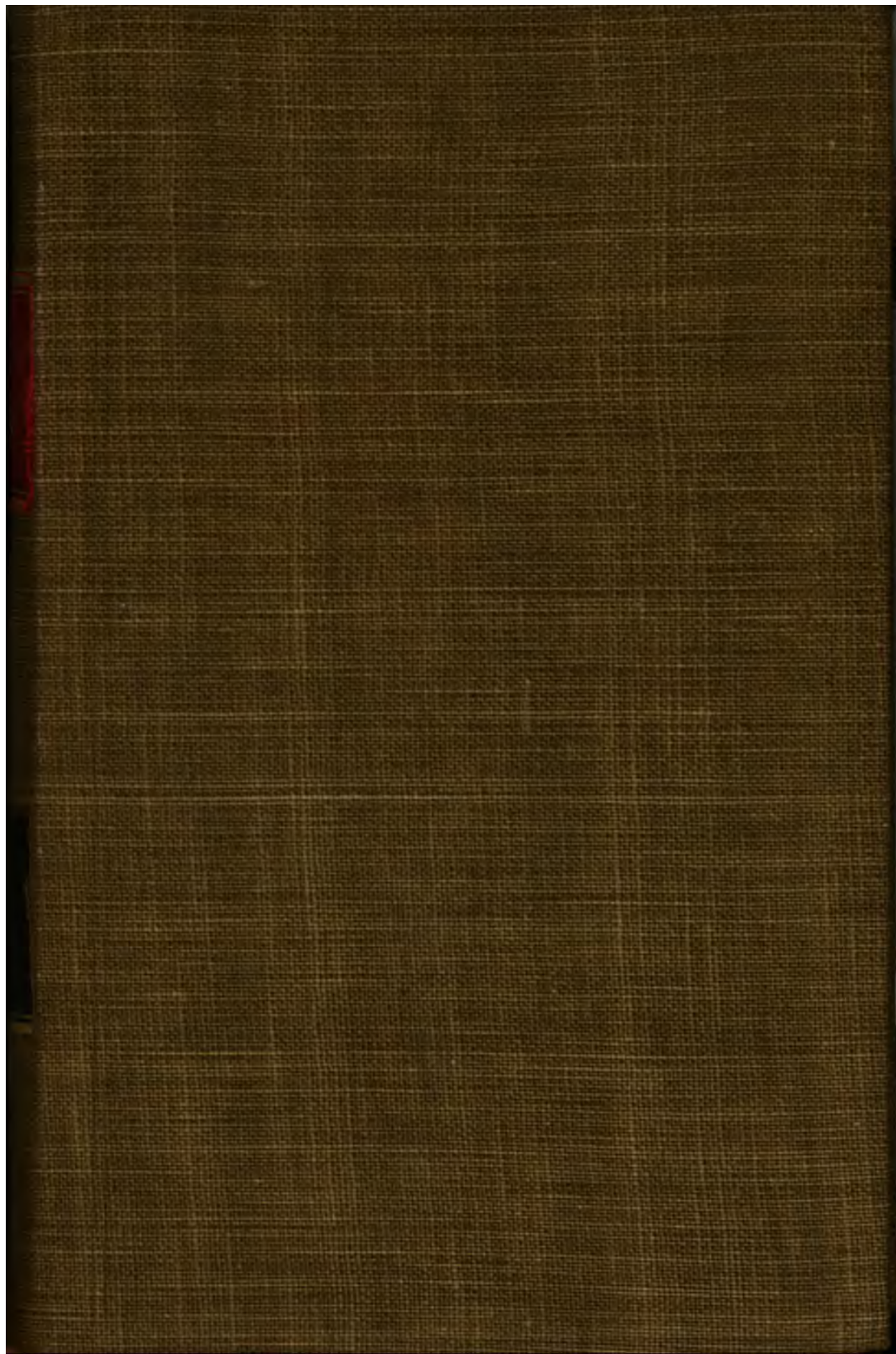
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THE
MINING REPORTS.

A SERIES CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN AND ENGLISH REPORTS, ARRANGED
ALPHABETICALLY BY SUBJECTS,

WITH NOTES AND REFERENCES.

By R. S. MORRISON,
OF THE COLORADO BAR,

VOL. XV.

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MINING REPORTS.

VOL. XV.

CAPLES ET AL. V. STEEL.

(7 Oregon, 491. Supreme Court, 1879.)

- ¹ Purchaser concealing existence of mine on land. A person who knows that there is a mine on the land of another, of which fact the owner is ignorant, may nevertheless buy it without disclosing his knowledge of its existence to the owner, and this will be no fraud on the part of the purchaser.
- ² Where, however, one about to purchase land wilfully misstates any material fact to the owner, or by any act intentionally misleads him in regard to the value of the land, and through these misrepresentations succeeds in inducing the owner to part with his property for less than its value, a court of equity will relieve him, and set aside the contract thus made as a fraudulent transaction.

Appeal from Multnomah County.

The facts are stated in the opinion.

NORTHUP & GILBERT, for appellants.

DOLPH, BRONAUGH, DOLPH & SIMON, for respondent.

By the Court, KELLY, C. J.

The respondent, William Steel, on the twenty-seventh day of July, 1875, sold to the appellants, C. G. Caples and T. A. McBride, a tract of land in Columbia county, containing one hundred and sixty acres, for three hundred and twenty dollars,

¹ *Harris v. Tyson*, 14 M. R. 634.

² *Daniel v. Brown*, 33 Fed. 849; *Falls v. Carpenter*, 6 M. R. 397.

twenty dollars being paid in cash, and two promissory notes given for the balance. At the same time an obligation was given by Steel to Caples and McBride to convey the land by deed to them upon the payment of the notes. The first note was paid at maturity, and the second one deposited in the First National Bank of Portland for payment, having been made payable to the order of the cashier of the bank. When it became due it was also paid to the cashier for the respondent, who declined to receive the money.

The respondent alleges in his answer, that after the payment of the first note, and before the second became due, he was informed of the existence of a coal mine under the soil of the land in controversy, and that appellants knew before they bargained for it the fact that there was a valuable coal mine on the land. He further alleges that the appellants conspired together to defraud him by concealing this knowledge when they were under obligations to make it known before they purchased the land. The respondent notified appellants that he would not complete the contract, and tendered them back the money they had paid him, with interest, and also the second note, which they refused to receive. This suit was then brought to enforce the specific performance of the contract. The burden of proof rests upon the respondent to establish two propositions:

1. That there is a coal mine on the land in controversy.
2. That the appellants perpetrated a fraud upon him in making the purchase.

The testimony is quite voluminous, and much of it irrelevant to the matters in issue, but taking it all together we think the respondent has failed to show that there is any vein or ledge of coal upon the land in question, or even upon the adjacent tracts. Small seams have been discovered within a short distance of the land in controversy, but no vein of any value has been satisfactorily proven to exist either on this or the adjoining tracts, and any increased value which may have been added to the land since the purchase by appellants is purely speculation, and arises altogether from the mere possibility that coal may hereafter be discovered upon it in quantity and quality sufficient to make the mining of it profitable. It is a matter of vague conjecture whether the respondent has

or has not suffered any loss on account of the sale to appellants, and courts of equity will not, any more than courts of law, relieve a party from even a fraudulent act which is followed by no loss or damage: 1 Story's Eq. Jur., 203.

We think the evidence equally fails to show that the sale of the land to appellants was procured through any fraudulent act on the part of either of them, toward the respondent.

A person who knows that there is a mine on the land of another, of which fact the owner is ignorant, may nevertheless buy it without disclosing his knowledge of its existence to the owner, and this will be no fraud on the part of the purchaser: *Fox v. Mackreth*, 2 Bro. C. C. 400; Fry on Spec. Perf., Sec. 464; *Harris v. Tyson*, 24 Pa. St. 347. Where, however, one about to purchase a tract of land willfully misstates any material fact to the owner, or by any act intentionally misleads him in regard to the value of the land, and through these misrepresentations succeeds in inducing the owner to part with his property for less than its value, a court of equity will relieve him, and set aside the contract thus made as a fraudulent transaction.

Tested by the principles here laid down, we are at a loss to perceive wherein the respondent was misled or deceived by any word or act of either of the appellants, or that they acted otherwise than fair in regard to the whole transaction. As stated by himself in his testimony, the respondent was unacquainted with the land, and went to the residence of Dr. Caples, one of the appellants, and told him that he wanted him, Caples, to take him there, and show him the land. This was done in accordance with the request. The timber and the lay of the land were shown so far as it could conveniently be done. And respondent says that Dr. Caples represented the timber and the quality of the soil as really better than he afterward found them. This is all he inquired about, or concerning which he expressed a wish for information in regard to the land. If he had inquired of Dr. Caples whether there were any indications of a coal mine on or near the premises, then it would undoubtedly have been his duty to answer truly or remain silent. But no such question was asked, no such information was sought, and therefore no deception was practiced by Caples in saying nothing about the efforts which had been

made to discover coal on the adjoining tracts of land. Nor was he under any obligation to take respondent to the several places where shafts had been sunk or tunnels run into the ground in prospecting for veins of coal. The principle is well settled in equity jurisprudence, as we have already stated, that a person who knows that there is a mine on the land of another, of which the owner is ignorant, can lawfully and safely buy it without informing the owner of the existence of the mine. A purchaser is not bound by our laws to make the man he buys from as wise as himself.

The case of *Bowman v. Bates*, 2 Bibb, 47, has been referred to by counsel for respondent as analogous to the one under consideration. We do not so regard it. There the purchaser, who had discovered a salt spring on a tract of land in Kentucky, by artifice, prevented the agent of the vendor, who was aware of the fact, from giving that information to his principal, and then sent his brother to Virginia, where the vendor resided, and bought the land at much less than its actual value. It was the deception practiced upon the vendor and the misrepresentations made to him that constituted the fraud for which the deed was very properly set aside.

The decree of the court below is reversed, and it is now ordered and decreed that the respondent execute and deliver to the appellants a deed for the premises described in the complaint, within three months from the date of this decree.

1. Right of vendee, under a bond for title, to remove fixtures erected by him: *Moore v. Vallentine*, 6 M. R. 112.

2. When purchaser may rescind or purchase superior title and hold his vendor to reimburse its cost: *Kindley v. Gray*, 6 Ired. Eq. 445.

3. Discovery of gold by vendee in default pending the fulfillment of an executory contract for the purchase of land: *Falls v. Carpenter*, 6 M. R. 397.

4. Construction of contract to sell or lease: *Johnston v. Mendenhall*, 15 M. R. 101.

5. Misrepresentations sufficient to avoid contract, must be of matters of fact, not of opinion: *Cooper v. Lovering*, 6 M. R. 662; *Gordon v. Butler*, 105 U. S. 553; *Rendell v. Scott*, 70 Cal. 514; *Southern Dev. Co. v. Silva*, 15 M. R. 435.

6. A contract for the future delivery of ore vests no title in the vendee unless the ore is set apart: *Randolph Iron Co. v. Elliott*, 3 M. R. 63.

7. Money paid for stock upon fraudulent misrepresentations, may be recovered without tendering a reconveyance of the land which was the foundation of the fraud: *McCabe v. Burns*, 6 M. R. 665.

8. Vendee of mining plant for consideration payable in installments,

partly in default, but the default not followed by entry by vendor, may pass title: *Turner v. Hardcastle*, 11 C. B. N. S. 683.

9. Party can not accept interest to develop a mine, lose his money and then claim a lien: *Brunswick v. Winter*, 5 Pac. 706.

10. Where a vendee is to pay the balance of purchase money out of the net earnings and thereafter sells, the money becomes at once payable: *Linn v. Butler*, 8 Colo. 355.

11. The holder of a certificate of sale can maintain trover for ore taken out during redemption period: *Ward v. Carp River Co.*, 47 Mich. 65; 50 Id. 522.

12. Where a vendee refuses to accept deed, the vendor may treat the contract as rescinded and sue for damages, or elect to go for specific performance: *Gilpin M. Co. v. Drake*, 8 Colo. 586.

13. A sold to B, receiving some money, and agreeing to receive balance of consideration in stock in a company to be formed: *Held*, that the corporation was a mere agency to carry out the agreement between B and A, and B could set up the fraud of A as a defense to a suit on the purchase money mortgage: *Cornell v. Corbin*, 64 Cal. 198.

14. One who buys in good faith, for a valuable consideration, without notice of prior equity, is a *bona fide* purchaser: *Lakin v. Sierra Buttes M. Co.*, 25 Fed. 337.

15. A purchaser, claiming to be such in *bona fide*, must show, affirmatively, payment and want of notice: *Id.*

16. Sale of coal at a royalty construed as a grant—not a lease: *Edwards v. McClurg*, 39 Ohio St. 41; and see *Coal Co. v. Mining Co.*, 40 Ohio St. 559.

17. Part payment; attempt to treat installment as forfeit: *McCormick v. Rossi*, 70 Cal. 474, 15 M. R. 433.

18. Power of court to order sale of land beyond its territory: *Piedmont Co. v. Green*, 3 W. Va., 54, 98 Am. Dec. 799.

BROUGH V. HOMFRAY ET AL.

(L. R., 3 Q. B. 771. Queen's Bench, 1868.)

Safe working of colliery—Air must go to the headings. By rule 1 of the general (statutory) rules to be observed in every colliery or coal mine, and ironstone mine, by the owner or agent thereof, "an adequate amount of ventilation shall be constantly produced in all coal mines, etc., to dilute and render harmless noxious gases, to such an extent that the working places, and the traveling roads to or from such working places, shall, under ordinary circumstances, be in a fit state for working and passing therein:" *Held*, that it was not sufficient compliance with this rule to cause ventilation to pass along the working places and traveling roads, but that so much of the mine must be kept so ventilated as to render the working places and traveling roads safe.

Case stated by justices of Monmouthshire, under 20 & 21 Vict. c. 43.

1-3. An information was preferred by the appellant, under ss. 10 and 22 of 23 & 24 Vict. c. 151, entitled, "An Act for the Regulation and Inspection of Mines,"¹ charging that the respondents, being the owners of a certain colliery called the Bedwellty Pit, did not cause an adequate amount of ventilation to be constantly produced in such colliery to dilute and render harmless noxious gases to such an extent that the

¹23 & 24 Vict. c. 151, s. 10. The following rules, herein referred to as the general rules, shall be observed in every colliery or coal mine, and ironstone mine, by the owner and agent thereof: 1. An adequate amount of ventilation shall be constantly produced in all coal mines or collieries, and ironstone mines, to dilute and render harmless all noxious gases to such an extent that the working places of the pits, levels and workings of every such colliery and mine, and the traveling roads to and from such working places, shall, under ordinary circumstances, be in a fit state for working and passing therein. 2. All entrances to any place not in actual course of working and extension, and suspected to contain dangerous gas of any kind, shall be properly fenced off, so as to prevent access thereto.

Section 22. If any coal mine, colliery, or ironstone mine be worked, and * * * any of such general rules or special rules, provisions of which ought to be observed by the owner and principal agent or viewer of such coal mine, colliery, or ironstone mine, be neglected or willfully violated by any such owner, agent or viewer, such person shall be liable to a penalty of not exceeding £20.

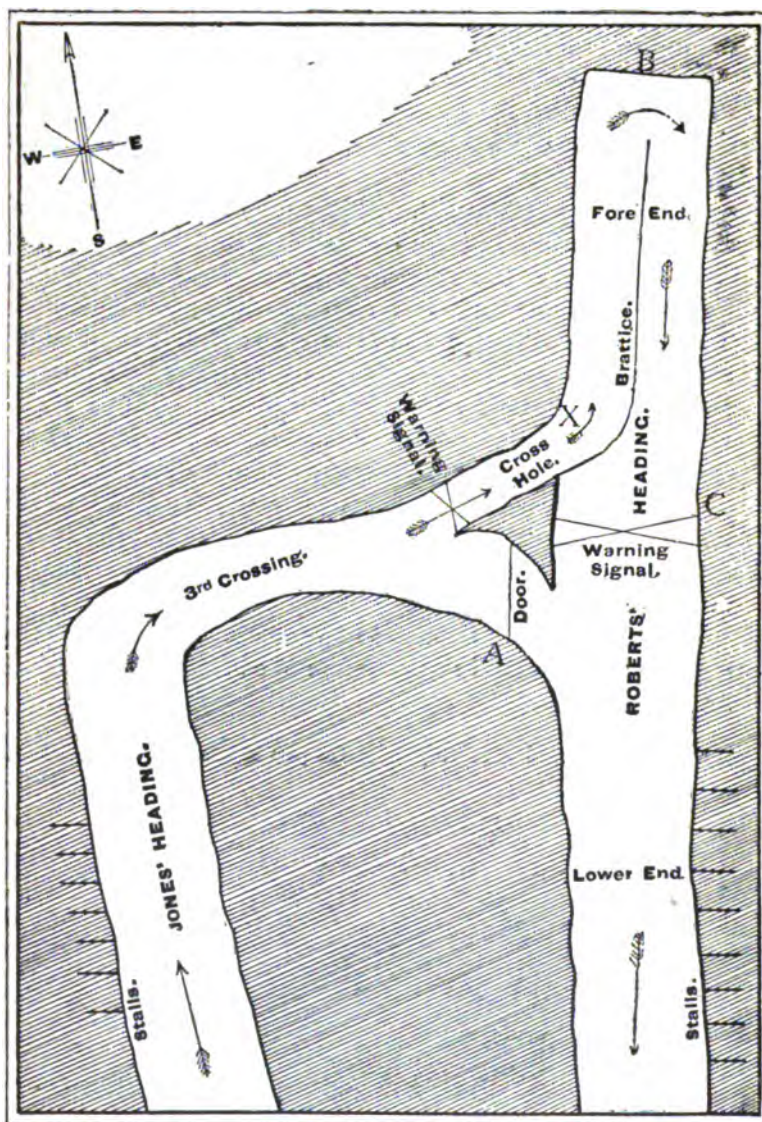
working places of the pit's levels and workings of such colliery, and the traveling roads to and from such working places, should, under ordinary circumstances, be in a fit state for working and passing therein.

4. It was proved that the respondents were the owners of the colliery called the Belwellty Pit, and a plan of the workings in the colliery was proved and is to be taken as part of the case.¹

5. The ventilation of the colliery passed down the pit and along the intake level until it got into the heading called Jones' heading, and it proceeded along Jones' heading into the cross-heading called third crossing, a door in which, at A, diverted the ventilation thence into and through the small cross-heading, marked cross-hole, into the heading called Roberts' heading, and by means of a brattice, (that is, a canvas partition,) it was conducted into the upper part or fore end of Roberts' heading, to the face of the heading at B, and then backward round the brattice and along Roberts' heading to the upcast shaft. The direction of the arrows shows the course of that part of the ventilation from the downcast or intake to its discharge at the upcast pit.

6. This had been the mode of ventilating this part of the colliery for more than a year before Wednesday, the 14th of June, 1865.

¹ The plan annexed sufficiently shows the part of the colliery in question.



59- (Not drawn to Scale : from X to B is, in fact, nearly 90 Yards.)

7. The top or fore end of Roberts' heading, and the top or fore end of Jones' heading, were each in solid unworked coal, and the third crossing and the cross hole was also driven in solid unworked coal, and the coal was entirely unworked and workable adjoining and around the fore end of Roberts' heading and Jones' heading, and the third crossing and the cross hole.

8. The stalls on the left or west side of Jones' heading, and other stalls in that heading, and the fore end of that heading, were being worked on the 14th, 15th and 16th days of June, 1865, and had been continually worked previous to those days.

9. The stalls in the right or east side of Roberts' heading, and other stalls in that heading, were being worked on the 14th, 15th and 16th of June, 1865, and had been continuously worked previous to those days.

10. The driving on of the fore end of Roberts' heading and the working of coal therein, had been temporarily discontinued for about eighteen months before the beginning of June, 1865.

11. In the beginning of June, 1865, Mr. William Beavan, the manager of the colliery, gave direction to put the fore end of Roberts' heading above the third crossing into order and repair, and one Richard Jenkins was employed for five or six days before the 14th June, 1865, working at the repairs of the fore end of Roberts' heading, above the third crossing, so as to resume operations therein, for the working of coal therefrom.

12. The third crossing and cross hole were part of the airway conducting the ventilation from Jones' heading into the fore end of Roberts' heading as before mentioned. The cross hole was about three feet high and four feet wide. In the beginning of the month of June, 1865, the manager of the works gave directions to enlarge and convert the third crossing into a roadway for bringing the coal worked on the fore end of Jones' heading into Roberts' heading, so that it might be taken down that heading to the level heading for conveyance to the surface.

13. David Jones, and his son, a boy about thirteen years of age, were employed so to enlarge and convert the third

crossing into a roadway, and they worked at such alteration until they had, on the 14th of June, completed it up to the door marked A, which diverted the ventilation into the cross hole and the fore end of Roberts' heading.

14. On the 14th of June, David Jones mentioned to the fireman of the colliery, John Jehu, who is an under agent, that he (David Jones) intended taking down the door; but he was told by the overman not to do so as it would withdraw the ventilation from the cross hole and the fore end of Roberts' heading, and would be dangerous.

15. Notwithstanding such directions from the fireman to David Jones not to take down such door, he did so on the morning of the same 14th of June.

16. The consequence of the taking down of such door was that the ventilation would not pursue its course into the cross hole and the fore end of Roberts' heading, but would pass direct along the third crossing into Roberts' heading and so down that heading toward the up take pit.

17. Within half an hour after taking down the door, and such interference with the course of ventilation, the fore end of Roberts' heading would become filled with explosive gas, and be highly dangerous; and, in fact, shortly after the door had been so taken down, the fireman, John Jehu, found on examining the fore end of Roberts' heading that it had become filled with explosive gas, as the ventilation therein had ceased.

18. Upon the door being so taken down, it became impracticable for Thomas Jenkins to continue his operations in the fore end of Roberts' heading in consequence of the ventilation there having ceased, and explosive gas having accumulated therein, and he discontinued his work, but was to resume it as soon as the ventilation could be restored.

19. On the fireman, John Jehu, finding, on the morning of the 14th of June, which he did immediately it was done, that the door had been so taken down, he put up the fences and warning signals across the little cross hole, and at the point marked C, of Roberts' heading, just above or to the north of the point where the third crossing enters Roberts' heading, so as to prevent access either to the cross hole or to the fore end of Roberts' heading. The justices found that

there was no intention to resume work in or allow any one to enter any part of the fore end of Roberts' heading until the ventilation thereof had been properly restored.

20. It was communicated to William Beavan, the colliery manager, by Richard Jenkins, on the 14th of June, 1865, in answer to an inquiry in the street why he was not at work, that David Jones had taken down the door, and William Beavan directed Richard Jenkins to tell John Jehu, the fireman of the colliery, to replace the door immediately, and that direction was given to John Jehu, but he did not replace the door, alleging that it would be dangerous to do so till Saturday, when the men would be out of the colliery.¹

21. On the morning of Thursday, the 15th of June, William Beavan had a conversation with John Jehu personally, and also with John Reynolds, the overman of the colliery, as to replacing the door, but William Beavan, John Jehu and John Reynolds all agreed that it would be dangerous to do so, from the quantity of gas accumulated in the fore end of Roberts' heading, while the men were at work in the colliery, and that it would not be safe to do so until the following Saturday night, when the men would be out of the colliery, and it was delayed accordingly.

22. David Jones and his son, on Wednesday, the 14th, Thursday, the 15th, and on Friday, the 16th, until the explosion hereinafter mentioned occurred, continued their work in the third crossing. The other workmen continued their operations on the 14th, 15th, and on the 16th (until the explosion) in the lower or southern end of Roberts' heading and the stalls opening out of it, and in Jones' heading and the stalls leading out of it, and in the other parts of the colliery.

23. On Friday morning a violent explosion occurred in Roberts' heading, but how it occurred could not be ascertained. David Jones and his son and several persons were killed, and several others were also injured.

24. The fireman had, on the morning of the explosion, be-

¹ The case had been sent back to be re-stated, and to have a copy of the evidence appended, which was accordingly done; it was explained in the evidence that the danger from putting up the door would have arisen in this way—that the ventilation being again directed into the fore end of Roberts' heading, the gas would have been driven thence into the lower end of the heading and other working places.

fore it occurred, been through the work to examine the condition of the ventilation, and he had that morning, pursuant to his duty, by pushing his lamp between the fencing, found that the fore end of Roberts' heading was filled with the accumulation of gas as it was on Wednesday after taking down the door, and also on Thursday. The fencing was put up with a view to prevent access to such gas.

25. The justices dismissed the information on the ground that they were of opinion that the top of Roberts' heading was not, on the facts proved, a working place on the 16th of June, 1865, within the meaning of the first general rule in s. 10 of 23 & 24 Vict. c. 151. (See note, *ante*, p. 6.)

26. If, upon the evidence, the court thinks that in point of law there was no willful violation of the first general rule on the 16th of June, and that under ordinary circumstances an adequate amount of ventilation was produced in the working places of the colliery to dilute and render harmless noxious gases, and that the fore end of Roberts' heading was on the said day not a working place within the meaning of the said first general rule, and that the respondents should not have been convicted, then the information was properly dismissed; but if, in the opinion of the court, it was otherwise, then the respondents should have been convicted.

MANISTY, Q. C. (with him H. MATTHEWS, Q. C.) for the appellant.—The justices seem to have interpreted Rule 1 as if it were only necessary to keep up ventilation in the working places and roads themselves, but it is clear that the whole mine must be so ventilated as to keep the places actually occupied by the workmen in a fit state for working. The explosion took place in Roberts' heading, without doubt, from the escape of gas from the top or fore end. As soon as the door at A was removed, the current of air, instead of passing out of the third cross heading, through the cross hole, and so into the fore end of Roberts' heading, up one side of the brattice and down the other, went direct through the doorway into the lower end of Roberts' heading, leaving the fore end entirely without ventilation. Although there was no work going on at the top, the working was continued all along in the stalls at the lower end. Rule 1 was, therefore, clearly violated.

The court then called upon

H. JAMES, for the respondents.—The fore end of Roberts' heading was not a working place within Rule 1, and there is no evidence that the gas escaped from thence into the lower end; on the contrary, the course of ventilation, after the door was taken down, would keep the gas entirely above the third crossing. Rules 1 and 2 must be read together, and Rule 2 had been complied with by the barriers or warning signals put up across the end of the cross hole, and across Roberts' heading above the third crossing.

(MELLOR, J.—Rule 2 is only an additional precaution, and can not be taken as narrowing the first rule.)

The inference to be drawn from the evidence is, that the explosion took place above the barriers from some one having removed them; if so, the respondents were not liable for the consequence.

(COCKBURN, C. J.—Why should it be assumed that the workmen were not in their usual place?)

(BLACKBURN, J.—Paragraph 21 shows that the overmen were aware of the great accumulation of gas in the upper end of Roberts' heading. The dangerous part might have been shut off entirely from the lower end by a door or partition, or the men ought immediately to have been withdrawn.)

COCKBURN, C. J.—We are agreed that there is evidence going to show that the ventilation was not sufficient to keep the working places and roads in a fit state for working and passing in. It is not enough that the working place itself has been ventilated; but the intention of the rule is that the mine, or at least so much of it as is sufficiently contiguous to a working place as that it may operate upon a working place, should be kept ventilated. The justices, on the contrary, seem to have thought the rule was sufficiently complied with if the ventilation was kept up in the working places; and the facts are not sufficiently found to show whether the explosion arose in the upper end or lower down in Roberts' heading. At all events, the case must go back to the justices, with the intimation of our opinion that, though the working places were sufficiently ventilated, if the parts contiguous were not ventilated, the rule has not been complied with.

BLACKBURN, J.—The rule requires the mine to be ventilated

to such an extent as to make the working places and traveling roads safe for ordinary use.

MELLOR, J., concurred.

LUSH, J.—The owners or agents of the mine are bound to ventilate the mine so as to keep the working places safe.

PER CURIAM.—The case must be remitted to the justices, with the intimation of the opinion of the court, that it is not enough to ventilate the working places and traveling roads; but that so much of the mine must be kept so ventilated as to render the working places and traveling roads safe.

Case remitted accordingly.

COMMONWEALTH EX REL. WILLIAMS, Inspector of
Mines, etc., v. BONNELL ET AL.

(8 Philadelphia, 534. Court of Common Pleas, 1871.)

¹Two outlets. The act requires two outlets at least 150 feet apart, at every place where coal mining is carried on, but it does not require these two outlets to belong to the same mine.

Constitutionality of Ventilation Act. The coal mine ventilation law, act of March 3, 1871, is constitutional, and the court will enforce strict compliance with all its provisions.

²Abuse of the act. The proviso to the third section does not authorize the production of coal for market under the pretext of "making another opening through coal."

In equity.

H. W. PALMER, for relator.

A. RICKETTS and GENERAL E. S. OSBORNE, for defendants.

HARDING, P. J.

This proceeding has been instituted in this court, under the provisions of the act of the General Assembly of the Commonwealth of Pennsylvania, entitled, "An Act providing for

¹ *Lehigh Valley Co. v. Jones*, 10 M. R. 30.

² *Haddock v. Com.*, 103 Pa. St. 243.

the health and safety of persons employed in the coal mines," approved the third day of March, 1871.

The bill sets forth that the relator is the inspector of mines for the Middle District of Luzerne and Carbon counties, and that Samuel Bonnell, Jr., is the owner of a coal mine in the county of Luzerne, within the bounds of the said Middle District, and also within the jurisdiction of this court.

It charges that the mine or colliery is worked through a single shaft, and that the seams or strata of coal which are thus being worked, have no communication with any second opening or outlet, whereby another means of ingress and egress is available to the persons there employed in mining.

It charges that Samuel Bonnell, Jr., employs persons to work in the said mine or colliery for the purpose of mining coal for market, and that such persons, to the number of twenty persons and upward, are there daily engaged in mining, raising and shipping coal in contravention of law.

It charges that Samuel Bonnell, Jr., has not provided and maintained a metal tube from the top to the bottom of said shaft, suitably calculated and adapted for the free passage of sound therein, and through which conversation may be had between persons at the bottom and at the top of the shaft; nor has he provided a sufficient cover over the carriage used for letting down and hoisting up the persons employed in the said mine; nor has he caused to be attached a suitable brake to the drum which is used by steam power for the purpose of letting down and hoisting up the persons employed in said mine.

It charges, finally, that Wm. L. Lance, Sr., Walter W. Lance and DeHaven Lance, are employed in superintending, managing and conducting the business of said colliery.

The bill concludes with a prayer, that an injunction may issue from this court to restrain the said Samuel Bonnell, Jr., William L. Lance, Sr., Walter W. Lance, DeHaven Lance and all the agents, servants and workmen of Samuel Bonnell, Jr., and all other persons deriving authority from him, or his said superintendents, from working the said colliery, or permitting any persons to work therein, except such persons as may be adjudged sufficient by the relator in driving a second opening into the said mine, until full compliance with the provis-

ions of the act before referred to has been made by the said Samuel Bonnell, Jr.

On presentation of this bill, prepared as it was in conformity with our rules of equity practice, we granted a preliminary injunction, and also the customary rule to show cause why the same should not be dissolved, returnable within five days after notice, to the defendants.

In obedience to the rule and notice, the defendants appeared in court, some of them personally, and all by counsel, and asked that the injunction be dissolved. They make no formal denial of the allegations contained in the bill, but predicate their request mainly on the unconstitutionality of the act under which the proceedings have been taken. They further press upon our consideration the manifest hardship and the great pecuniary loss to which they will be subjected in the use of their own property, if the provisions of the act of assembly in question be strictly enforced. And the effect on them, it is said, will not be a tithe of the loss which must inevitably be sustained throughout the length and breadth of this great coal region, in case this law shall be literally carried into operation. Millions of capital, it is urged, invested here in good faith, under former laws, must remain unproductive for months, and thousands of laborers must suffer in idleness, with hunger and want across their very hearth-stones already, if the sole attention of operators must be given to strict compliance with the said act.

We are not unmindful of some of the probable effects which may flow from the stringent enforcement of this law, nor are we insensible to the responsibility devolving upon us in connection with it; but we were placed here to *take* responsibilities incident to the position, not to *shirk* them. We shall accordingly dispose of the questions raised under this law, alike novel in its features and destitute of analogies, yet vastly important in its general scope and effect, to the best of our ability. We can bring nothing to our aid, save an honest judgment grounded in ordinary common sense. With regard to the constitutionality of the law, we shall enter into no extended review. It has been well said by an eminent jurist, late chief justice of our State, that a constitution lays down certain great and fundamental principles, according to

which the several departments it calls into existence are to govern the people; but all auxiliary rules which are to give effect to these principles, must, from the necessity of the case, come from the legislature; and further, that it is for this very purpose that the constitution establishes a legislature.

If the Commonwealth of Pennsylvania, through her legislature, can police our towns and cities, why may she not police the coal mines within her borders? If, through her legislature, she can attach conditions, rules and regulations, which are to be observed by her citizens in the use of their own peculiar property, what is there about coal mines, or the owners thereof, that should specially exempt them from her supervision and control? If she recognizes, almost as a part of her organic law, applicable to the property of her citizens, the rule, long ago grown into a maxim, *sic utere tuo ut alienum non laedas*, why may she not make it equally applicable to the lives of her citizens? The act, as we view it, is nothing more nor less than a mandate to the operators of coal mines, that they shall so work them as not to injure the health, nor endanger the lives of persons employed in and about them. Of its constitutionality we have not the slightest doubt. It stands upon the statute book, known of all men, as the offspring of "Avondale." Of its propriety and its necessity the law-making power was taught not a moment too early. And we may say, now, that had its provisions been faithfully observed by the operators, or stringently enforced by the officer whom it called into existence, there would have been, in all human probability, twenty more living, industrious producing human beings, and fifty less widows and orphans in "West Pittston" than there are to-day.

The third section of the act is in these words: "Four months from and after the passage of this act, it shall not be lawful for the owner or agent of any anthracite coal mine or colliery, worked by or through a shaft or slope, to employ any person in working within such coal mine or colliery, or to permit any person to be in such coal mine or colliery, for the purpose of working therein, unless there are in communication with every seam or stratum of coal worked in such coal mine or colliery, for the time being at work, at least two shafts or slopes, or outlets, separated by natural strata, of not less than

one hundred and fifty feet in breadth, by which shafts, slopes or outlets, distinct means of ingress or egress, are always available to persons employed in the coal mine or colliery; but it shall not be necessary for the two shafts, slopes or outlets, to belong to the same coal mine or colliery; if the persons therein employed have ready and available means of ingress and egress, by not less than two shafts, slopes or outlets, one or more of which may belong to another coal mine or colliery: Provided, that a second opening can be had through coal; but if a tunnel or shaft shall be required for the additional opening, work upon the same shall commence immediately after the passage of this act, and continue until its final completion, with not less than three shifts in each twenty-four hours, and as many hands to be employed as can be put to work with advantage—the inspector to be the judge as to the least number of hands engaged per shift. This section shall not apply to opening a new coal mine or colliery, nor to any working for the purpose of making a communication between two or more shafts, slopes or outlets, so long as not more than twenty persons are employed at any time in the said new mine or working. And the term ‘owner’ used in this act, shall mean the immediate proprietor, lessee or occupier of a coal mine or colliery, or of any part thereof; and the term ‘agent’ shall mean any person having, on behalf of the owner, the care or direction of any coal mine or colliery, or of any part thereof.”

While we admit that there is a want of clearness in this section, nevertheless, a careful examination of the section, as a whole, can not fail to elicit its true meaning. And, first, it stops outright, after a period of four months from its date as a law, the working of every mine or colliery which has but a single opening; but there is one condition on which such a mine may still be operated. It is, that “every seam or stratum of coal wherein mining is carried on, shall be in communication with a second outlet, separated by natural strata of not less than one hundred and fifty feet in breadth;” that is, the openings, or outlets, shall be apart on the surface, at the points of ingress and egress, at least one hundred and fifty feet. And the reason for this is clearly obvious. The outlets are to be sufficiently remote from each other, so that in

case of destruction by fire, or otherwise, of the necessary erections about one outlet, the other may be used for the safe and convenient egress of the persons employed where the destruction has taken place.

By the terms of the act, it is immaterial whether these two outlets belong to the same mine or not. All that is positively enjoined, is a second, safe and convenient means of exit for the persons employed in the mine, in case of accident. Any mine or colliery, therefore, having but a single shaft, or slope, but being in communication with a second outlet, and having the additional requisites for the safety of the persons employed therein, such as a metal tube from the top to the bottom of the shaft, through which conversation may be freely had, and having, also, "an improved safety catch, and a sufficient cover overhead on every carriage used for lowering or hoisting persons," with other gearing connected with the drum, such as proper "flanges or horns," and an "adequate brake," when "steam or water power" is used for "lowering or hoisting persons," as prescribed in the tenth section of the act, may be operated to its full capacity, and coal may be mined or cut therein, and prepared for, and sent to market, with as much freedom as though the act had not been passed.

There are some other general requisites prescribed in the act which must be observed; but they are of minor importance, and their observance will be prompted as much by the interests of the operators and their workmen as by the fact that the law with respect to them is mandatory.

And herein we say, without reserve or qualification, that under no other state of things can a coal mine or colliery, which has but a single shaft or slope, be worked and operated in producing coal for market. And further, that the "owner, lessee or occupier" of such a coal mine or colliery, or any "agent" who has the "care or direction" of such a coal mine or colliery, and who persists in working it in contravention of the plain and reasonable requirements of the statute, as before explained and referred to, is guilty of flagrant and inexcusable wrong; and any inspector of mines, who, being cognizant of the fact, but nevertheless permits or suffers such working to be carried on, is "grossly neglectful of his duties."

No matter though it be urged that operators, lessees and

agents of mines or collieries of this character are doing all they can to drive these second openings, and that the work in each case is of great magnitude, requiring large outlays both of capital and labor, but also that time of wide limit is necessary for their completion, severally. Still, however true all this may be, when violations of this law, as alleged in this bill, and which have not been formally contradicted, are brought to our notice, and the power of the court is invoked to check them, we can officially only know what the law is, and, knowing it, in the discharge of our plain duty, we shall administer it, albeit this colliery, and a dozen others like it in the region, be brought to a standstill.

And further, in regard to the suggestions as to the cost in capital and labor, and the necessary expenditure of time, in making compliance with the provisions of this law, we say that the act itself gave four months from the date of its passage—March 31, 1870—for the very purpose of rendering compliance on the part of the operators practicable and possible; but, in the case before us, for causes which have not been satisfactorily explained, not only have the four months gone, but eleven other months have followed them. And yet, in the language of this bill, these defendants are there, or until the granting of the preliminary injunction were there, with their workmen and servants, “engaged in mining, raising and shipping coal, and in carrying on the usual and ordinary business of said mine daily.”

Assuming that the law, when it gave only four months for making a second opening, was the enactment of an impossibility, so far as this particular colliery was concerned, what are we to adjudge, when the fact is brought to our notice that fifteen months have passed by, and no second opening has yet been reached. Is a second opening impossible? Such a proposition will hardly be urged affirmatively. We are left, then, to conclude that the owner and the agents of this colliery have acted, either on the assumption that, because a second opening was not possible within the four months, and because a lenient inspector had not prohibited them from working on beyond the limit as fixed by the statute, therefore it was not necessary that they should be in a hurry about making any second opening at all, or more probable still, that in view of

the recent suspension, and the probable activity in the coal market consequent on resumption, they would drive on their colliery in the usual manner, hoping and expecting continued indulgence on the part of the inspector and taking the chances for the rest.

The recent calamity at West Pittston, as it seems to us, ought to have admonished these wrong-doers—and we trust that it may admonish others in like case offending, if there be any such in the region—that taking the chances in violating this plain and reasonable statute, means nothing short of assuming responsibilities which shock the law-abiding public, and which may result in spreading sorrow and gloom around many humble firesides, and in casting a shudder over the land.

The defendants, as we have said before, though they make no formal denial of the charges as set out in the bill, nevertheless raise in their argument what amounts to a partial denial of the main averments. They admit that they are working in the mine, and taking coal therefrom for market; but they claim that they have a right so to do, at least to the extent of the product of the labor of not more than twenty men.

They say, in other words, "that a second opening can be had through coal," and that, while they are exclusively engaged on such second opening, necessarily a large amount of coal is cut in the gangway or gangways, which is hoisted out of the shaft, and which, being their own exclusive property, they are sending to market. They produce before us an elaborate draft of their mine and the workings therein, which, we have no doubt, correctly represents the whole interior order of things. We observed that not one, but several gangways were headed in the direction of the point where the second opening was to be struck, as well on one side of the shaft as the other, and although they were wide and somewhat serpentine in their character, and penetrating into an extensive area of coal, still, novice as we are in such matters, we could not resist the conclusion that, while these many wide, serpentine, deep, penetrating and double gangways might all be necessary for a successful "second opening through coal," still they certainly afforded most ample and extensive fields for mining and producing coal for market.

And here we are brought to the consideration of the pro-

viso under which it is contended that the work was and is permissible, which has been carried on in this mine since the expiration of the four months immediately succeeding the passage of the act, and prior to the service of the injunction.

By the positive terms of the third section of the act, every mine having but a single shaft or slope, and being without communication with a second outlet, was, at the expiration of the four months, under the legislative ban, and its owners, or occupiers, were forbidden to work it. More than that; if the owners or occupiers of mines in such condition, in defiance of the law and reckless of the consequences, continued on with their operations, then it became the imperative and sworn duty of the mine inspector for the proper district, to proceed against such owners or occupiers in the manner provided by the terms of the fifth section of the same act, which is in these words: "Any of the courts of law or equity of this Commonwealth, where the coal mine or colliery proceeded against is situated, upon application of the inspector of coal mines and collieries of the proper district, acting in behalf of the Commonwealth, shall prohibit, by injunction or otherwise, the working of any mine in which any person is employed in working, or is permitted to be, for the purpose of working, in contravention of the provisions of this act, and may award such costs in the matter of the injunction, or other proceeding, as the court may think just."

In short, such mines should have been unconditionally stopped; or at least their owners or occupiers should have been restrained in their use of them, within the strict limits of the statute. That such has not been the case, unfortunately, for a score of poor fellows and their now destitute families, is, we fear, too true. Disobedience of the law on the one hand, and a failure to enforce it on the other, have wrought already enough of disaster.

If there are any more such mines or collieries thus worked and operated within the borders of our jurisdiction, we need only say that this court will always be open, and its process and power will always be at the call of the proper officers, whom this act itself created for the actual purpose, amongst other duties, of closing up at once such unlawful mantraps.

We wish not to be regarded as uncharitable. We recog-

nize in this business the weakness of human nature. We are aware of the temptations, and even the difficulties which the owner or occupiers of such mines are obliged to encounter. In addition to the gains and savings to be derived from the continued and uninterrupted working of their property—often in themselves a sufficient inducement to warrant the risk of violating, or, at least, of chancing a violation of a statute bristling all over with pains and penalties—come the pleadings and the beggings of the miners themselves, who have left hungry families at home, for the privilege of being allowed to go to work, promising to release the operators from all responsibility, and taking upon themselves all the risks and dangers attendant on the position they thus voluntarily and anxiously seek.

Nor are we unmindful of corresponding difficulties which beset the inspectors of mines. In most cases they have been selected from among the miners themselves, and the wants and necessities of these people are known and appreciated by them. When, therefore, they are besought by the miners and laborers for lenity toward the operators, in order that the wolf may be kept from the door at home, no matter how delicate and keen may be the sense of official duty, it must necessarily be dulled by such contact. But they are the sworn officers and ministers of a law which, in one sense, was made to protect these men, even against themselves; and no amount of sentiment or sympathy should be allowed to swerve them from a faithful and a strict discharge of all their duties under the act. There is no middle course with honor to themselves.

We have seen that all mines or collieries of the character above described were to be stopped on and after the expiration of four months, as provided by the statute. We have seen, also, that there was one condition, namely, if a second opening could be had through coal, on which their working could be continued.

But to what extent is such further working permissible? This becomes, under the views which the defendants' counsel have taken of the case, an important question, on which it is our duty to pass.

The beginning of the proviso to the third section of the

act, it will be remembered, is as follows: "Provided, That a second opening can be had through the coal;" and then it branches off upon the subject of other openings, such as tunnels or shafts, thus omitting at that point any specific directions as to the extent to which such second opening may be driven, or the force that may be employed therein. But further on in the proviso this language occurs: "This section shall not apply to opening a new coal mine or colliery, nor to any working for the purpose of making a communication between two or more shafts, slopes, or outlets, so long as not more than twenty persons are employed at any one time in said new mine or working."

With all due respect for the opinions of the counsel for the defendants, we are constrained to say that we fail to discover the slightest ambiguity in this part of the enactment. Very true, it might have been drawn with greater precision and clearness; but yet, the body of the law is tangible there, and its spirit is so plain and distinct that even a wayfaring man ought to discern it.

The proviso is simply cumulative in its character. The section of which the proviso forms a part, in terms prohibits the working of a mine or colliery having but a single shaft or slope; while the proviso follows modifying the ban in many important particulars. For instance: it prescribes how a tunnel or shaft, when either shall become necessary as an additional opening, shall be driven. It numbers and times the shifts, and makes the inspector the judge as to the least number of men to be employed on each shift, all of which is plain and understandable. It then restricts the otherwise sweeping provisions contained in the section itself, by adding that they shall not apply to the opening of a new mine, nor to any working for the purpose of making a communication between two or more shafts, slopes or outlets, so long as not more than twenty persons are employed at any one time.

Now, the outset of the proviso, as will be seen, makes permissive the working of a mine or colliery already closed by the terms of the section itself; but only on one condition, namely, that the working shall be for a second opening through coal. Such working, therefore, must necessarily be toward an outlet; and that outlet may be another shaft, or

another slope, or it may be an outlet to be reached at the surface by following through coal to the outcrop of the seam or stratum wherein the working was carried on at the time the mine or colliery as such, was stopped.

If we omit, then, in the proviso, all that is cumulative and does not refer to other specific matters, and read only that relating to a second opening through the coal—and the terms openings and outlets are clearly synonymous—the language of the proviso will be thus: “This section shall not apply to any working for the purpose of making a communication between two or more outlets, so long as not more than twenty persons are employed at any one time in the said working.”

Adopting this as the correct interpretation of the statute, the inquiry is still extended as to how the “twenty persons” shall be permitted to work. We are aware that there exists a difference of opinion on this subject, as well among lawyers as laymen; and that in many instances in this coal region, operators, while keeping within the limit of “twenty persons” in working through coal for a second outlet, have, in accordance with their own construction of the law, worked sometimes fifteen or eighteen persons in cutting coal for market, while only five, oftener only two, have been employed in driving for the second outlet.

Though we do not assume positively, that herein lies the explanation why so many mines or collieries in the region are yet without a second outlet, still such an explanation is not at all unreasonable, and must stand for what it is worth. At all events, such working, if indeed it is still carried on, had better cease at once. It is without even the merit of shrewdness for its authors. On the contrary, it can be regarded as little better than a stupid attempt at dodging the law; and the earlier, perhaps, a lesson in the pains and penalties of the act is learned therefor, the better it will be for everybody.

As we have shown before, this working with no more than twenty men for a “second opening through coal,” constituted the only condition under which certain mines or collieries, otherwise closed up by the provisions of the statute, could be worked at all. It can not be claimed, however, that this permissive working can be carried on with any other view, or for any other purpose than that mentioned in the act. Cutting

coal for market, therefore, whether with one man or twenty men, except in so far as it is a necessary incident of driving on through a seam or stratum toward a second outlet, is not only not a declared purpose of the statute, but on the contrary, it is in direct and absolute contravention of the express terms thereof.

And in this connection we hold further, that, even where large quantities of coal are necessarily cut in driving for a second outlet, if it has to be hoisted through a single shaft or slope, and broken and screened by the machinery and fixtures erected, as is usually the case, directly over the mouth of the shaft, before it is ready for market, then such coal can not, in all cases, be regarded as a necessary incident of driving for a second outlet. In some instances it may be so regarded, so far as hoisting it out of the mine, and thus getting it out of the way of the workmen is concerned, but in other instances it can not in any sense be so considered. For example: a colliery may not have been long in operation, and consequently the area in the seam or stratum at the foot of the shaft where the mining has been exclusively carried on, may not be sufficiently large to receive the coal necessarily cut in advancing to a proposed second outlet; and therefore the hoisting of such coal out of the mine could be regarded in no other light than as essential to the convenient and successful pushing on of such second outlet.

But then, if it should not be all ready for market, we can discover no warrant in the act, either express or implied, whereby the operator, even with the permission of the inspector of mines, would be authorized in starting his breaker and screens—if they were connected with the hoisting gearing and driven by the same power, and erected over the shaft so that the destruction of one would be the destruction of all—and thus preparing such coal for market. We repeat again, that, under the law, such a mine can only be worked for the single purpose of reaching a second outlet; and, as we understand it, breaking, screening and preparing coal for market, even though it has been cut in the manner before referred to, is not within the spirit of the act, and it is certainly not within its terms.

It follows, therefore, as a matter of course, that all coal which may be cut in driving for a second outlet, and which is

hoisted out of the shaft or slope in order to make room for further convenient working, and which is prepared for market when it is thus brought out, is no longer touched by any legislative ban; but, on the contrary, it is the untrammelled property of the operator, who may do with it as he deems proper.

Again, for example: Another colliery may have been operated for years with but a single shaft or slope, and the seams or strata at the bottom thereof, may have been exhausted to such an extent as to afford an ample stocking ground for all coal cut in the work for a second outlet; and thus, the necessity of hoisting the same in order to make room for the workmen, and for the more rapid and successful prosecution of the working, may not exist. True, to take out such coal would be vastly more convenient and much less expensive to the operator; and further, all of it so taken out and ready for the market, as before explained, might be made at once available; but the very act of hoisting it would involve some of those many risks inseparably connected with operations of this character, particularly where the hoisting gearing and all the cumbrous erections pertaining to a colliery were connected together, and constructed, as they now are, directly over the shaft or slope.

To the construction to be put judicially upon the law, as it bears upon the subject-matter in this immediate connection, we have given the most earnest study and thought. We have sought for a construction which would harmonize the known, great interests of the operators in this behalf, with the safety of the miners and laborers in their employ; but staring us in the face at every step of our investigation, were the plain, literal terms of the enactment itself, conforming in full rigor to its title—an act providing for the health and safety of persons employed in coal mines—and we therefore have been obliged to adopt a construction, stringent though it be, alike in conformity therewith.

It follows, then, that coal cut in mines and collieries, under circumstances as last referred to, can not be hoisted out of the shafts or slopes, if a sufficient stocking ground exists within the mines themselves.

It is further charged against Samuel Bonnell, Jr., one of the defendants in this bill, and the owner of this mine, that he

"has not provided and maintained a metal tube from the top to the bottom of said shaft, suitably calculated and adapted for the free passage of sound therein, through which conversation may be held by and between persons at the bottom and top of said shaft, nor a sufficient cover overhead on the carriage used for lowering and hoisting persons employed in said mine, nor has he attached or caused to be attached to the drum, worked by steam, and used for lowering into and hoisting out of said mine persons employed as aforesaid, an adequate brake," etc.

The 10th section of the act applies to every coal mine or colliery in the region, whether worked by a single shaft or slope or whether in communication with one or more other shafts, slopes or outlets; and its language, so far as it relates to the subject-matter of this charge, is as follows: "The owner or agent of every coal mine or colliery, opened and operated by shaft or slope, shall provide and maintain a metal tube from the top to the bottom of such slope or shaft, suitably calculated and adapted to the free passage of sound therein, through which conversation may be held by and between persons at the bottom and the top of the shaft or slope; and also provide * * * a sufficient cover overhead on every carriage used for lowering and hoisting persons; * * * an adequate brake shall be attached to every drum or machine, worked by steam or water power, that is or will be used for lowering or raising into or out of any said mines, and the main link attached to the swivel of the wire, or any other rope, shall be made of the best quality of iron, and tested by weights, or otherwise, satisfactorily to the inspector," etc.

Further, in the same section, occurs the following: "The neglect or refusal of any person or party to perform the duties provided for and required to be performed by sections six, seven, eight, nine and ten of this act, by the parties therein required to perform them, shall be taken and be deemed a misdemeanor by them, or either or any of them, and upon conviction thereof, they, or any or either of them, shall be punished by imprisonment and fine of not exceeding five hundred dollars, or either, at the discretion of the court trying the same."

We need hardly say that this section is as much a part of the law as any other section of the act; nor that its observance is as clearly enjoined, both upon the operators and the

inspectors, as legislative mandate and intendment can possibly make it. It is the law, and must be obeyed.

We believe now, that we have passed upon all the features of this act of assembly which have been presented by the bill in this case. We have done so somewhat at length, for the reason that the bill, in the main, raises most, if not all, the really important questions that can arise under the law as a whole; and for the further reason, that there is a general wish among operators, miners, mine inspectors and the business public at large, that the act in question should receive a judicial construction.

There is, perhaps, a single other feature of the law which we ought now to notice, and that relates to the duties of mine inspectors. We have often been approached by these officers—always, however, in a proper spirit and with the best intentions—who, in their zeal to discharge their duties faithfully, were desirous of obtaining from us some instructions relating to the construction of this law, and to the duties and responsibilities which it imposed on them.

Except upon some general matters, we have declined to advise them further than that they should employ some gentleman of the bar in whom they had confidence, and should consult with him freely upon all matters pertinent to their positions respectively. Any other course on our part, as we conceive, would have been *extrajudicial*, and therefore improper.

We say to them now, however, that having been selected for the positions they hold, because of their superior skill and knowledge in all that relates to mining and the proper and safe working of mines, and having severally taken upon themselves the solemn obligation of an oath, well and faithfully, and to the best of their judgment and ability, to discharge the duties of their offices, respectively, their first care should be to ascertain what their duties are under the law; and having done this, their next should be to see, and that too, without any ganzze of favor or fear over their eyes, that the operators in the region over whom they are put to exercise a sort of police control, conform all their mines and workings—not a part, but all—to the letter of the law.

In this only, is there even comparative safety for their fellows; in any other course, experience has shown that there is danger and death.

In conclusion, we point them to the provisions of the 16th section of the act, under which the court may have duties to perform; and we would further remind them, that, in so far as our duties are concerned, we shall not have one construction of the law for the operators, and another for the inspectors; but on the contrary, whenever the power of the court shall be invoked thereunto, through legitimate channels, we shall enforce all of its provisions, irrespective of interests or parties, as we understand them.

The 16th section, before referred to, is in these words: "It shall be the duty of the court of common pleas of the proper county, whenever a petition signed by not less than fifteen reputable coal operators or coal miners, or both, setting forth that the inspector of coal mines and collieries grossly neglects his duties, or that he is incompetent, or that he is guilty of malfeasance in office, to issue a citation in the name of the Commonwealth, to the said inspector, to appear at not less than fifteen days' notice, on a day fixed before said judges, when the said court shall proceed to inquire and investigate the allegations of the petitioners; and if the court find that the said inspector is grossly neglectful of his duties, or that he is by reason of causes that existed before the appointment, incompetent to perform the duties of said office, or that he is guilty of malfeasance in office, the court shall certify the same to the governor, who shall declare the office of inspector of the district vacant, and proceed, in compliance with the provisions of this act, to appoint a properly qualified person to fill the office; and the cost of the said investigation before the court shall be borne by the removed inspector," etc.

We say, finally, and once for all, that in the discharge of our duties arising under the provisions of this act, and with no other motive than that springing from a sense of official obligation, we shall, whenever the occasion may arise, and as long as this law remains on the statute book, administer it strictly, and in accordance with its plain and unmistakable terms.

And now, to wit, July 3, 1871, after due consideration of the complainant's bill, and after hearing the arguments of counsel, the injunction heretofore granted in this case is hereby continued until the further order of the court.

COMMONWEALTH EX REL. WILLIAMS V. WILKESBARRE
COAL CO. ET AL.

(29 Leg. Int. 218. Common Pleas of Luzerne County, Pa., 1872.)

Distant heading reached by incline from old workings. Where an incline from old workings which had all the statutory outlets has been carried down along the seams of coal several hundred feet, and coal is there developed and worked through such incline without other access to the surface, it is practically a new mine with but a single outlet, within the inhibition of the mine ventilation act, and an injunction will be granted restraining the occupiers of the same from thus working it.

It is immaterial whether the two outlets belong to the same mine or not.

¹ The ventilation act is constitutional.

A "casus omissus" in a statute can never be supplied by judicial construction.

In equity.

HARDING, P. J., delivered the opinion of the court.

This is a proceeding under an act of the general assembly of the Commonwealth, entitled "An act providing for the health and safety of persons employed in coal mines," approved March 3, 1870.

The first paragraph of the bill, after setting out that the relator is the inspector of mines for the Middle District of Luzerne and Carbon counties, and that the defendants are the lessees and occupiers of a coal mine and colliery, commonly known as the colliery of the Wilkesbarre and Seneca Lake Coal Company, situated in Plains township, Luzerne county, and within the jurisdiction of this court, charges, substantially, that the said coal mine or colliery is worked through a single slope, by the side of which there is a small air-way only; and that there are not two outlets in communication with the seam or stratum of coal thus worked, "separated by natural strata of not less than one hundred and fifty feet in breadth," whereby distinct means of ingress and egress are always available to the persons employed in the said mine or colliery.

The second paragraph of said bill, as now amended, charges

¹ It is further construed in *Com. v. Haddock*, 103 Pa. St. 243.

that the defendants have sunk a slope from the old workings in a certain vein, called the "Hillman vein," to the depth of three hundred feet and upward, along and following the pitch of said vein, and have driven gangways from the foot of said slope, thereby opening what is practically a new mine; and that they are engaged in working the same without having two outlets connected therewith for the safe and convenient ingress and egress of persons employed therein; and, further, that the defendants employ a large number of persons, to wit, forty persons at the same time, and permit them to be in the said mine, where they are daily engaged in mining, raising and shipping coal, and in carrying on the usual and ordinary business of said mine, in contravention of the act of the general assembly before referred to.

The bill concludes with a prayer that an injunction may issue from this court to restrain the said defendants, their agents, servants, workmen, and all other persons deriving authority from them, from working the said mine or colliery, until compliance shall have been made with the provisions of the act of assembly aforesaid.

We had entertained the hope that the act of the 3d of March, 1870, better known as the "Mine Ventilation Law," had been so fully passed upon by this court in *Com. v. Bonnell*, 15 M. R. 14, as to render any further adjudication on our part unnecessary. Such a result, however, experience has shown to be beyond the range of possibility. The magnitude of the interests affected by the provisions of the act, together with the responsibilities which it imposes upon the officers created by it, combine to make it a starting point for questions hitherto entirely novel in the general litigation of the country, but which, for the present, and prospectively, are keenly set with matters of large concern, considered in their relations to public, to corporate and to individual rights.

The present case has about it a phase altogether new, and hence a statement embracing its peculiarly distinguishing feature, must precede, necessarily, its further consideration understandingly. Detached from the trammels imposed by the language of the bill, and stated rather as the drafts of the premises, the affidavits produced before us, and the arguments and admissions of counsel presented it, the case discloses, sub

stantially, the following features: The defendants are the lessees and occupiers of a field of coal, which, at the point where the mining operations are carried on, is oval in its shape, or which, at least, does not lay in a horizontal plane. A slope has been driven from the surface downward, following the pitch of the seam or stratum of coal to a very considerable depth; and at the foot of it the coal has been exhausted to the extent of about forty acres. The area thus created is denominated in the language of the bill, "old workings of a vein called the Hillman vein." In communication with this area, or these workings, there are several distinct outlets which extend therefrom to the surface, such as air-ways and air-shafts, and which are separated—at least some of them—from the main slope, at their respective place of exit on the surface, for a distance exceeding "one hundred and fifty feet," thus affording always convenient and ready means of ingress and egress available to persons employed therein.

So far, then, as these "old workings" constitute the mine or colliery of the defendants, there is, and has been hitherto, even more than a compliance with the provisions of the third section of the act of the 3d of March, 1870. By the terms of that section, "two outlets" are enjoined; here there are six. Clearly, therefore, the mine thus far is not within the legislative inhibition. The sudden, and even total destruction by fire, or otherwise, of the elaborate erections pertaining to the colliery, such as the engine house, the breaker, the hoisting gearing with all its complicated and heavy machinery, would not entomb the persons employed in the mine. Indeed, considering the multiplied avenues of exit, if the main slope should be utterly closed up with burning timber and masses of detached rock, slate or coal, the miners and other persons employed below could scarcely be endangered at all.

The complaint of the mine inspector and plaintiff in this bill is not, however, in any sense aimed at the mine or colliery of the defendants, so far as the same is constituted by the "old workings" in the "Hillman vein." On the contrary, it is leveled in earnest at what is alleged to be a most dangerous mischief in connection with this colliery, but which is deeper down in the earth by several hundred feet than the old workings of the Hillman vein.

As we have before remarked, the seam or stratum of coal at the point where an area of forty acres has been worked out, is oval in its shape, or more distinctly speaking, perhaps, it pitches downward. In this area, but following still the same seam of coal, the defendants have made what is termed a new lift, and have pushed forward and downward a slope to the distance of three hundred feet and upward. At the bottom of this slope they have driven gangways, and opened breasts and chambers into the coal, which, as shown by the drafts submitted to us, constitute an extensive field for mining operations. Here the chief product of their colliery is obtained; and here, in the language of the bill, is where they have practically opened "a new mine, and are engaged in working the same without having two shafts, slopes or outlets," etc., as required by law.

At the hearing of the case several affidavits were presented on the part of the defendants, some of which set forth, *inter alia*, that the defendants had not made, nor were they making, a new mine "either practically, theoretically or actually;" but that, on the contrary, the mining was carried on in the same vein, in continuation simply of the prior working, and by "the ordinary method of mining practiced in this region, as well as elsewhere;" and further, that "there are two and more outlets in communication with the said vein and all its workings."

However much we may admire the adroit and general terms in which those affidavits are couched, still we are obliged to note that they do not set up any denial of the ruling allegations contained in the plaintiff's bill of complaint. They make no averment that the seam or stratum of coal penetrated by this continued slope is in communication with "at least two shafts, or slopes or outlets, separated by natural strata of not less than one hundred and fifty feet in breadth, by which shafts, slopes or outlets, distinct means of ingress and egress are always available to the persons employed in the coal mine or colliery." Indeed, it was not shown by the drafts, nor claimed in the argument, that these "two and more outlets" were anything else than mere passage-ways, or air-ways, running along, near to, and parallel with the continued slope. Furthermore, the only outlets which pass out to the surface, and which were shown to be in communication with this particular seam or

stratum of coal, are those communicating with the "old workings" thereof, where it is denominated as the "Hillman vein," and they have been herein previously referred to at length.

The important question raised by the plaintiff's bill of complaint on the one side, and combated by the defendants on the other, depends a'most entirely on the construction to be given to the act of the 3d of March, 1870, as it bears upon the particular features presented in the present case. Is this mine or colliery, projected by a slope, as it now confessedly is, down into the earth for a distance exceeding three hundred and fifty feet below the point where there are "at least two outlets, separated by natural strata of not less than one hundred and fifty feet in breadth," and there worked by a large number of persons in the employ of the defendants, and who are engaged in mining, raising and shipping coal—within the inhibition of the law?

In support of the application for an injunction, plaintiff's counsel proffers the statute. He further relies upon the charges as contained in the bill, which he claims have not been contradicted, but, on the contrary, have been sustained both by the affidavits and by the drafts submitted in the case.

In antagonism to the application, the counsel for defendants proffer, first, the unconstitutionality of the statute; and second, its construction as laid down by this court in *Com. v. Bonnell*, before referred to; and, in this connection, he contends that, assuming the charges contained in the plaintiff's bill to be correct so far as they relate to the manner in which the mine of the defendants is operated, still, the case does not fall within the terms of the act of the 3d of March, 1870, but, on the contrary, it presents, at most, a *casus omissus*; and consequently is altogether free from any statutory ban whatever.

With regard to the constitutionality of the act of the 3d of March, 1870, we briefly indicated our views in *Bonnell's case*, before referred to. These views remain yet unshaken, notwithstanding the very able argument of the counsel for defendants in opposition thereto. We simply add in this connection, that this statute, relating as it does exclusively to the manner of operating coal mines, embodies nothing less than the will of the supreme power of the Commonwealth, which

every citizen, no matter what may be his interests, is bound to obey; and therefore, until it shall be amended, altered or repealed by the same power which created it; or at least until a court higher than ours shall adjudge that our construction of it has been conceived in error, we shall administer and enforce its provisions as we understand them, even though the great pecuniary interests involved in the coal production of the region, together with the varied mining interests dependent thereon, may be materially prejudiced thereby. The question considered in an aspect pertaining to the constitution, it must be remembered, is not one of ethics, nor of right, nor of expediency; it is solely one of legislative power. Quoting, as we did in *Bonnell's case*, substantially, from one of the very eminent jurists of our State, a constitution lays down certain great and fundamental principles, according to which the several departments it calls into existence are to govern the people; but all auxiliary rules which are to give effect to these principles, must, from the necessity of the case, come from the legislature. It is for this very purpose that the constitution establishes a legislature.

Recognizing, therefore, the act in question as the amendment of legislative wisdom, or in other words, the creation of legislative power, it would be not only a most unwarrantable derogation thereof, but an exercise of unblushing presumption on our part to set at naught a statute thus originated and which was passed for the special and declared purpose of protecting the health and the lives of a very large class of citizens. It would indeed be the utterance for law of a vain and dangerous conceit of our own, in opposition to and above the aggregated wisdom and power of the whole Commonwealth. In effect it would be making, not expounding, the law.

And again, adopting in substance the language contained in the opinion of this court in *Bonnell's case*, we say, if the legislature can prescribe conditions, regulations and rules which are to be observed in the use of any peculiar property by the owners, what is there about coal mines specially to exempt them from similar and appropriate supervision and control? Clearly from the very necessities incident to our system of government, a power of this character is inherent in the legislature. It has been so conceded almost from

time immemorial. Indeed, the exercise of powers immediately in analogy with this, has not only thus been recognized, but the legislature has again and again delegated them to the cities and boroughs—mere creatures of statutes—throughout the State. We allude, of course, to the corporate powers of cities and boroughs in establishing a police force, prohibiting the carrying on of any manufacture, trade or business which may be noxious or offensive to the inhabitants, or the sale or exposure of fireworks or other inflammable and dangerous articles, and limiting and prescribing the quantities that may be kept; making such regulations as may be necessary for the health and cleanliness of said cities and boroughs, prohibiting nuisances therein, regulating markets; in short, exercising a class of powers pertaining to the health and safety of the citizens of such cities and boroughs, as broad in their compass and as trammeling of what, under other circumstances, might be denominated individual right, as anything contained in the act in question affecting the rights of owners, lessees or occupiers of coal mines.

And further, as health and life occupy, in the scale of human estimation, a position immeasurably above that of possessions; and as the maxim which applies undeniably to property the world over —“make use of your own in such a manner as not to injure that of another” —needs no legislative iteration to make it as operative to-day as it was at the moment of its recognition, we are not prepared to say that this act “providing for the health and safety of persons employed in coal mines” was necessary at all to give effect to the purposes it had in view. Though a positive mandate to the owners and occupiers of coal mines that they shall so work them as not to injure the health nor endanger the lives of the persons employed therein, is it, after all, anything more than the mere embodiment, in statutory form, of a principle akin to natural law itself, and which springs alone from the internal dictates of reason?

In bar also to an injunction, as has before been stated, the counsel for defendants rely upon our ruling in *Bonnell's case*. In that case we said, referring to the third section of the act of the 3d of March, 1870, that it stops outright the working of every mine or colliery which has but a single opening; but there is one condition on which such a mine may still be oper-

ated. It is, that every seam or stratum of coal wherein mining is carried on, shall be in communication with a second outlet, "separated by natural strata of not less than one hundred and fifty feet in breadth;" that is, the openings or outlets shall be apart on the surface, at the points of ingress and egress, at least one hundred and fifty feet. And the reason for this is clearly obvious. The outlets are to be sufficiently remote from each other, so that in case by fire, or otherwise, of the necessary erection about one outlet, the other may be used for the safe and convenient egress of the persons employed in the shaft or place where the destruction has taken place. And, further, that by the terms of the act it is immaterial whether these two outlets belong to the same mine or not. All that is positively enjoined is a second, safe and convenient means of exit for the persons employed in the mine in case of accident. Any mine or colliery, therefore, having but a single shaft or slope, but being in communication with a second outlet, and having also the additional requisites for the safety of the persons employed therein, as prescribed by the statute, may be operated to its full capacity, and coal may be mined therein, and prepared for, and sent to market, with as much freedom as though the act had not been passed.

To this ruling we still adhere. And we repeat again what we said in that case, under no other state of things can a coal mine or colliery, which has but a single shaft or slope, be worked and operated in producing coal for market; and that any owner, lessee, or occupier of such a coal mine or colliery, or any agent who has the care and direction thereof, and who persists in working it in contravention of the plain and reasonable requirements of the statute, is guilty of flagrant and inexcusable wrong; and any inspector of mines, who, being cognizant of the fact, but nevertheless permits or suffers such working to be carried on, is grossly neglectful of his duty.

This language followed after we had quoted at length the third section of the act, and had explained fully what kind of outlet was therein prescribed. It was not to be a mere air-way or passage-way within a few feet of, and parallel with the particular shaft or slope, but it was to be an outlet separated therefrom by natural strata of not less than one hundred and fifty feet in breadth.

We can hardly conceive of an honest understanding so obtuse as to lay hold of a detached sentence, such as "all that is positively enjoined is a second, safe and convenient means of exit for persons employed in the mine, in case of accidents," and construe it as a warrant for working the slope which extends down into the earth over three hundred feet, and which has nothing more than a passage-way or air-way distant from it far less than one hundred and fifty feet, when such a construction was plainly counter to the whole drift of the opinion, as well as in direct antagonism to the terms of the law itself.

Not only do we stand by the opinion in *Bonnell's case*, but to the extent that the construction of the statute therein laid down will meet the case before us, we have already applied it, holding, as we have herein, that in so far as the "old workings" of a vein called the "Hillman vein," constitute the mine or colliery of the defendants, the same is not within the legislative inhibition.

It is not, as we have said before, at these old workings of the Hillman vein, that the plaintiff's bill of complaint is leveled; nor is it in concern for them except as they are an incident of the case, but rather for the mine or colliery as worked by the new lift, or through the continued slope, that this earnest contest has been pressed by the defendants. Considering, then, that the mine or colliery is operated, as was shown by the drafts and conceded in the argument, by a slope continued in a seam of coal from certain old workings there, down for a distance of three hundred feet and upward, with no second outlet communicating therewith after it leaves the old workings, except a passage-way or air-way, as has been described, another question of some importance arises, upon which it becomes our duty to pass. That question is: does the case thus presented constitute a *casus omissus*? If it does, then undoubtedly the present application must fail; for a *casus omissus* can never be supplied by the courts. It is not the province of judges to make laws; on the contrary, it is their duty to administer them as the legislature have made them; excepting, of course, such as infringe upon the constitution, and these it is their duty to set at naught altogether.

The construction of statutes is for the courts, particularly

when the legislature has not been sufficiently explicit in the terms used, or in designating the subject-matter to be embraced within the statutory provision; and such cases sometimes call into exercise a very responsible feature of judicial duty. The experience of centuries has not, however, failed to discover and to establish certain rules of construction which judges adhere to, and which lead to results in accord with the general interests of the State.

The sense and spirit of an act—its scope and intention—are primarily to be regarded in the construction of statutes. If the object be plain and intelligible as gathered from the whole act, then it is the duty of judges so to construe as to suppress the mischief aimed at, and advance the remedy contemplated. And where the object is at all in doubt, though the style or title of the act is of no controlling account over its clearly expressed terms, yet as a guide of the true intention of the law-giver, the title may be considered in connection with the other parts of the act. Whenever, therefore, the intention which the makers of a statute, especially one remedial in its character, can be discovered, it ought to be followed, in its construction, in a course consonant with reason, so as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy.

In *Pray v. Edie*, 1 Term, 313, where the policy of an act of Parliament had been questioned, Lord Mansfield said: "Whatever doubts I may have in my own breast about the policy of this law, yet, as long as it continues in force, I am bound to see it executed according to its meaning." And again, in the same case, he says: "Let us consider the mischiefs intended to be remedied, and the provisions of the act for remedying them."

The act of 3d March, 1870, has about it nothing which offers to the mind even a single doubt as to the legislative intent. Its very title, "An act providing for the health and safety of persons employed in coal mines," is suggestive of mischiefs which are to be remedied; its terms embrace a catalogue of these very mischiefs by name. And not only this, but the proper means are mentioned, and are enjoined upon the owners, lessees or occupiers of mines, whereby such mischiefs may be avoided. Maps of mines are to be prepared and kept, so that in case of the abandonment of any mine, either

in whole or in part, the dangers incident to the falling of the surface may be escaped; two outlets to every seam of coal worked by a shaft or slope are to be provided, distant from each other at least one hundred and fifty feet, so that any destruction of one, either by the burning up of the hoisting gearing and other necessary erections at the surface, or the closing thereof by falls of overhanging or adjacent slate, coal or rock, may not jeopardize the lives of the persons employed therein; suitable ventilation must be secured and kept up in every mine, in order that it may be always free from noxious, poisonous, inflammable and explosive gases; where such gases exist and can not be expelled by a single current of air, the mine must be divided into districts, carefully separated from each other, and each must be ventilated by a distinct current of air; and when any mining operations approach abandoned workings wherein inflammable gases or accumulations of water are suspected, bore holes must be driven at least twenty feet in advance, so that the dangers consequent upon these accumulations, such as fire from the one and inundation from the other, may not be encountered.

Recurring now to the mine or colliery of the defendants: Who will say that it is not within the scope and spirit of the act? Or who, that it presents a *casus omissus*? Adjudging, as we have already, that the mining operations are carried on in entire conformity with the statute down to the point where the new lift commences, namely, the old workings in the Hillman vein, still, following on from this new lift, does not the slope continue in a seam of coal for a distance of three hundred feet and upward, which is not in communication with a second outlet separated from said slope by "natural strata of not less than one hundred and fifty feet in breadth?" Thus operated and worked by the defendants, who employ a large number of persons in mining coal down at the bottom of this slope, can it yet be confidently urged that the mine is not under the ban of the statute? But it is even intimated that, being in a seam of coal which is in communication with two or more outlets, the mine is operated according to law. This is too technical, by far. Very true, the seam of coal, at the point where the old workings are, communicates with six different outlets, and is the same penetrated by and worked at the bottom of the slope, but down there this communication

does not extend. The six outlets from the "Hillman vein" do not communicate with the mining operations at the bottom of the slope by any second outlet "separated by natural strata of at least one hundred and fifty feet in breadth;" on the contrary, the extent of the communication is the slope itself and the passage-way or air-way hereinbefore described.

We have in hand, then, a mine projected down into the very home of poisonous, inflammable and explosive gases, and connected with it there is no second outlet as required by law. At the bottom of this mine, large numbers of men are daily "engaged in mining, raising and shipping coal for market." A fall of slate, or of coal, or of rock, occasioned by a faulty roof, or by an explosion of gases, might at any moment as effectually close up the only means of egress, namely, the slope and air-way, as did the burning timbers at Avondale and at West Pittston.

Ordered that an injunction issue in conformity with the prayer of the bill, restraining the defendants from operating their mine or colliery in connection with the new lift, or continued slope aforesaid, until the further order of the court.

HALL v. HOPWOOD.

(49 L. J. Mag. Cas. 17. Queen's Bench Div. 1879.)

¹ **Liability of manager for insufficient ventilation.** By the Coal Mines Regulation Act, s. 51, it is provided that in the event of any contravention of the general rules set out in that section, the owner, agent and manager shall be each guilty of an offense, unless he prove that he has taken all reasonable means to prevent such contravention. The first of such general rules provides that an adequate amount of ventilation shall be constantly produced in every mine. The respondent, who was a certified manager of a colliery, working upon a salary, was charged with an offense under section 51, rule 1. It was proved that the mine was improperly ventilated, and that the respondent might have improved the ventilation with the resources at his disposal, but that the requisite provision for the proper ventilation of the mine would have involved an outlay of £200: *Held*, that he was not chargeable for anything which involved an outlay of money, but was responsible for failure to use the means at his disposal for bettering the ventilation.

¹ *Frecherille v. Souden*, 48 Law Times, N. S., 612; *Wynne v. Forrester*, L. R., 5 C. P. Div. 361.

Case stated under 20 & 21 Vict. c. 43.¹

At a petty sessions holden at Mold on the 2d of December, 1878, an information was preferred by the appellant against the respondent, under section 51 of the Coal Mines Regulation Act, 1872, for having, on the 12th of October, 1878, as manager of the Alyn colliery, neglected to cause an adequate amount of ventilation to be constantly produced in the mine, so as to dilute and render harmless noxious gases, to such an extent that the working places of the shafts, levels, stables and workings of such mine, and the traveling roads to and from such working places, should be in a fit state for working and passing therein.

The respondent was the certified manager of the Alyn colliery.

The seam of the colliery in which the breach was alleged to have occurred was the main coal seam, ten feet thick, and the mine had an upcast and downcast shaft.

On the 12th of October, 1878, an inspector went under ground in the main coal seam, and on inspecting the workings in the colliery noticed that the lamps hung therein were burning very dimly, and that this was caused by the presence of a large quantity of carbonic acid gas, commonly known as "black damp." On proceeding to the working places at the bottom of the incline, a distance of from 400 to 500 yards from the pit's mouth, the ventilation was so bad with "black damp," that it was impossible to keep a candle lighted there,

¹By the Coal Mines Regulation Act, 1872, 35 & 36 Vict. c. 76. s. 51, it is enacted that "An adequate amount of ventilation shall be constantly produced in every mine, to dilute and render harmless noxious gases to such an extent that the working places of the shafts, levels, stables and workings of such mine, and the traveling roads to and from such working places, shall be in a fit state for working and passing therein. * * *

"Every person who contravenes or does not comply with any of the general rules in this section shall be guilty of an offense against this act; and in the event of any contravention of, or non-compliance with, any of the said general rules in the case of any mine to which this act applies, by any person whomsoever, being proved, the owner, agent and manager shall each be guilty of an offense against this act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance."

and the inspector noticed that the candles of three men who were working there kept going out from the same cause, notwithstanding that the faces of these working places were only five or six yards from the main air current. This current was so weak from want of a proper system of ventilation as to be utterly useless for its intended purpose, the only obstacle to prevent the air which came down the downcast shaft from passing direct to the upcast shaft without passing through or ventilating the workings, being a canvas cloth hung across the main roadway. By the frequent passage of tubs through this cloth, the lower part of it was torn very much, and the air passed up by the upcast shaft instead of going round the workings.

The justices found that the requisite provision for properly ventilating the mine would have involved an outlay of £200, but that the respondent might have improved such ventilation with the resources at his disposal.

The respondent received £1 a week as salary for his services in the colliery in question, and was the certified manager of another colliery in the same neighborhood. It also appeared that a Mr. Meldram was one of the owners of the Alyn colliery, and a director acting in the daily management thereof, and that the respondent had advised him and the other directors that a perfect system of ventilation was required, and that the cloth funnel in the main roadway was quite inadequate for the purpose of obstructing the air in a seam of coal of the thickness in question.

It was contended by the respondent that he was a mere paid servant of the company, not liable, under any circumstances, for the complaint laid, or at all events, if a manager, only to the extent of the means provided for him by his employers.

The appellant contended that the respondent, as manager, was directly liable by virtue of the Coal Mines Regulation Act, 1872, in respect of such contravention or non-compliance.

No evidence was called on the part of the respondent, whose evidence could not be taken under the act.

The justices considered the defendant could not be held responsible for keeping the mine properly ventilated, seeing that it involved an outlay of £200, and that, as he had done his duty by complaining to the resident managing director, the

proceedings ought to have been taken against the owners of the mine; accordingly they dismissed the information.

The question for the opinion of the court was whether, upon the above facts, the respondent had committed any offense against the Coal Mines Regulation Act, 1872.

GORST (A. L. SMITH with him), for appellant.

MARSHALL, for the respondent.

COCKBURN, C. J.

I confess I think it clear, upon the facts stated, that the respondent is legally liable. One of the rules appended to the 51st section of the Coal Mines Regulation Act, 1872, provides that there shall be an adequate amount of ventilation in every mine, and there is a proviso that neglect to comply with the rule, when proved, shall render the owner, agent and manager liable to a penalty, "unless he proves that he had taken all reasonable means by publishing, and to the best of his power enforcing," the rule as a regulation of a mine. Here it is found as a fact that the ventilation was inadequate, and the only question which we have to decide is how far the responsibility rests with the respondent. No doubt it is the duty of the owner of a mine, in the first instance, to provide proper ventilation, and the manager who has to share the responsibility can not reasonably be expected to expend his own funds. The statute, therefore, does not render it necessary that the latter should spend his own moneys in providing the requisite machinery to secure proper ventilation. So far as that is concerned, he may claim exemption by showing that he has pointed out the permanent alterations, or the introduction of machinery that is required, to the owners. The magistrates, therefore, are quite right in saying that the respondent was not liable for substantial alterations; but then they find that he had certain means at his disposal with which, had he so chosen, he might have improved the ventilation. Does this finding on the part of the justices render him liable? I think it does, with this reasonable qualification, that it is only with the means provided by his employer that he can be called

upon to mitigate the evil. I read the case as finding this; therefore the respondent has failed to prove he was exempted under the 51st section. To that extent the justices were, in my opinion, wrong. I can not say that the respondent ought not to be found guilty, although his offense is manifestly a very slight one. The case, therefore, must be remitted to the justices, with the opinion of this court that it is one in which they may convict.

MANISTY, J., concurred.

Case remitted.

1. Construction of Pennsylvania Mine Ventilation Act of March 3, 1870: *Delaware Canal Co. v. Carroll*, 10 M. R. 47; *Haddock v. Com.*, 108 Pa. St. 243.
2. The "act providing for the health and safety of persons employed in coal mines," held to be constitutional: *Daniels v. Hilgard*, 15 M. R. 280.
3. Penalty incurred under Stat. 18 & 19 Vict. c. 108, s. 4, for not ventilating mine on Sunday when actual work was suspended: *Knowles v. Dickinson*, 2 El. & El. 705.
4. The court should not enforce a contract in disregard of the ventilation and safety acts: *Abinger v. Ashton*, 6 M. R. 1.

THE PENNSYLVANIA COAL CO. v. COSTELLO.

(33 Pennsylvania State, 241. Supreme Court, 1859.)

Wages are the reward of labor and always come of contract express or implied.

¹ **Wages of skilled miners.** Wages earned by the personal manual labor of the debtor are exempt from attachment, although his superior skill and care as a miner may entitle him to a greater compensation than the common laborer.

Facts of the case—Breastmen and laborers in coal mining. Two miners are employed in a chamber; these employ one laborer between them. The money is paid to one or both the miners, who pay the laborer at a certain rate, or he may give notice and draw his own pay direct from the operator. *Held*, that the fact of the employment of this third party as a laborer under them did not deprive the money coming to them of the character of wages of labor under the act exempting such wages from attachment.¹

Error to the Common Pleas of Luzerne County.

This was an attachment execution issued by a justice of the peace on a judgment obtained by William Costello against Thomas Kennedy, and served on The Pennsylvania Coal Company as garnishees. The garnishees appealed from the judgment of the justice.

On the 15th October, 1855, the plaintiff obtained a judgment against the defendant for \$50.22, and issued this attachment, by virtue of which a debt of \$14.45, owing by the garnishees to the defendant, was attached in their hands; and the only question was whether this debt was liable to attachment.

On the trial of the cause it was agreed that the facts proved should be considered as a case stated, and submitted for the opinion of the court, with liberty to either party to take a writ of error. The court below (CONYNGHAM, P. J.), after fully stating the facts, gave judgment against the garnishee for \$14.45, to reverse which they brought error to this court, assigning generally that the court below erred in entering judgment on the case stated. The statement of facts is taken from the opinion below:

“It is conceded that The Pennsylvania Coal Company, the

¹ *Bowers v. Lonekin*, 6 El. & Bl. 584; *Sharman v. Sanders*, 13 C. B. 166; *Weaver v. Floyd*, 21 L. J. Q. B. 151.

garnishees, were indebted to Kennedy at the time the attachment was served, in the sum of \$14.45; and the record of Justice Helme shows that Kennedy, at that time, was indebted by judgment to the plaintiff in the sum of \$50.22. The amount due by the company to Kennedy was a balance due for work done in a chamber, as it is termed, of a coal bed, credited to him on their books. Welch was interested as a miner with him, but the account was kept in the name of Kennedy, to whom it is conceded this balance belongs, Welch having been fully paid for his portion by the company.

"The arrangement under which this indebtedness occurred is briefly this: The company employ two miners (sometimes four) to a chamber, who get out coal for a certain price per ton, delivered by cars outside, or at the shaft; the work of these men can be stopped, and the persons dismissed at any time by the proper superintendent. The two miners employ a laborer, as he is called, or two of them, as they think proper, and find their own tools, oil and powder (getting these things of the company, if they please, or of any other person), and are settled with monthly for all the coal credited to them for the work of the month. The money for all the work is paid to one or both of the miners, unless the laborer employed by the miners gives notice to the company to retain his wages, in which case the amount which would accrue to him is ascertained and fixed by the company at a certain rate per day, calling a definite number of cars a day's work, and graduated according to the price allowed the miner per ton. If the laborer so gives notice, the amount of his work is paid by the company to him, unless the miners pay him off. In this case Timothy McNulty was employed as a laborer, but gave no notice to the company, and was paid by the miners. The balance now due to Kennedy, as conceded, is the balance due for all the coal got out by the work of the two miners and one laborer during a month, under an arrangement such as above stated; the coal being credited on the books to Kennedy alone, and Welch, as entitled to one half, having been paid by the company."

McCLINTOCK, for the plaintiffs in error.

H. B. WRIGHT, for the defendant in error.

The opinion of the court was delivered by WOODWARD, J.

The company owed Kennedy \$14.45 for mining coal, and Costello having obtained a judgment before a justice of the peace against Kennedy, laid his attachment on this fund in the hands of the company.

The question is, whether the debt was attachable.

The act of assembly of 15th April, 1845, Purdon, 490, gives justices of the peace jurisdiction in attachment execution, but the proviso of the 5th section is in these words: "That the wages of any laborers, or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer."

Was Kennedy a laborer? Was the money attached wages? Were they wages in the hands of his employer?

If these questions must be answered affirmatively, the judgment below was wrong; for, to permit such a fund to be seized in execution would be to repeal the proviso.

The Pennsylvania Coal Company are a large mining and transportation company, having the chief seat of their operations at Pittston, in Luzerne county. They work numerous mines and employ a large body of miners. Each mine is divided into chambers, and the mode of distributing their labor seems to be by letting out these chambers to different miners at a fixed rate per ton for the coal delivered. The miners of each chamber employ one or more common laborers at so much per day. Welch, who was Kennedy's mining partner, says: "We worked one chamber; Timothy McNulty was the laborer. We all three worked together, and we paid our man by the day and we got what was left. Ten to ten and one half tons a day was a good day's work. Company paid 37½ cents a ton in winter, and 40 to 45 cents a ton in summer. The company furnished the powder and we paid for it. *Kennedy and myself got out the coal and hired the laborer. We were hired to go there and get out what coal we could.* We had no contract to get out any certain quantity, and did not know what we were to receive. We settled at the office how much the laborer was to have and how much we were to have. Mr. Gaines paid it to me, and I paid it over to the laborer. The laborer was paid according to the

price per ton for mining coal. What the whole came to was divided. We got miner's pay, and the laborer too got laborer's pay. If we got 40 cents a ton, the laborer got \$1 a day; if coal was $37\frac{1}{2}$ cents a ton, the laborer got 93 cents a day. I took in the laborer. We paid the laborer, and then made an equal share of what was coming. *That made the wages of myself and Kennedy as miners.* We settled monthly," etc.

This mode of carrying on the business was explained by numerous other witnesses, whose testimony need not be cited.

Now, we have here an employer and an employe, labor contracted for and performed, and wages resulting therefrom according to the contract. Wages are the reward of labor, and always come of contract express or implied. And it is material to notice that the fund attached represents Kennedy's labor and nothing else. McNulty's was paid for, and Welch's share was taken out of the money which the company's agent had paid over. What remained in the company's hands belonged to Kennedy. Assuming that the three raised ten tons a day at 40 cents a ton, their joint earnings per day were \$4; deduct McNulty's wages, \$1, leaving for Welch and Kennedy \$3, which, divided between them, would be \$1.50 a day for each.

If the other figures mentioned in the evidence be assumed instead of the above, the result will make it equally apparent that the fund attached in the employer's hands was Kennedy's reward for his labor, his wages. The balance, after paying McNulty, made, swears Welch, "*the wages of myself and Kennedy as miners.*"

Mining being an art that requires considerable skill to carry it on with safety and success, those whom the company employ to conduct a chamber are expected to work in it themselves. The powder and oil are intrusted to them. They, in fact, do the mining. The common laborer they employ is to remove the coal and rubbish out of the way of the miners, as fast as it is detached. For their superior skill and care the miners should receive more compensation than the mere heaver, and Welch's testimony is a clear exhibition of the mode in which these respective values are adjusted. But the labor of the miners is as truly labor as that of the subordinate whom they employ, and their earnings as truly wages as are

his. If the proviso would protect his earnings from seizure (a point that is not doubted), it must be held to protect the earnings of the miners. Any other construction would embarrass a large and productive branch of industry, which, doubtless, has adjusted itself in the best form for both employer and employe, and would also discriminate unfairly against the most meritorious class of laborers. Without the skill of the miner there would be no mining, or, if there were, it would be done at continual peril of human life. The miner is not a contractor who stands off and appropriates the profits of other men's labor, but he leads the way into the subterranean chamber, directs every arrangement and movement, and performs the efficient labor with his own hands. The statute does not define the labor it meant to protect, and it might be difficult to construct a perfectly satisfactory definition, but there can be no doubt that wages earned by the personal manual labor of the debtor are under the cover of the statute. In legislative judgment such wages belong rather to the laborer's family than to his creditors. And such was the fund attached. Whatever earnings of labor in other forms may be within or without the statute, we can not doubt that these earnings are within its policy as well as words, and therefore they must be held exempted.

I have been the more particular in stating the nature of this business, in order that it might be seen how broadly this case is distinguished from that of *Heebner v. Chave*, 5 Barr, 115, which was relied on by the defendant in error, both in the court below and here.

That was the case of an occasional contract—such as municipal bodies and private corporations now and then allot for the performance of some specific job. It was not the case, as this is, of an ordinary, every-day business. To say that the legislature did not intend to protect the profits which a contractor makes out of the labor of his hirelings, in grading a street for a borough, is not to decide the case before us. For here is an ordinary avocation—well regulated in practice—and one on which the families of many citizens depend for daily subsistence. It is too large an inference that the proviso is inapplicable here because it was not applied in *Heebner v. Chave*. If it was designed for what the judge in that case

said it was, "to secure to the manual laborer by profession and occupation the fruits of his own work for the subsistence of himself and family," Kennedy must have the benefit of it, for he was a manual laborer by profession and occupation.

Whilst, however, *Heebner v. Chave* is distinguishable from this case in the nature of the contracts under which the attached funds accrued, there is one point of identity. In both, the attached debtor labored in person to produce the funds.

This is a circumstance which we think ought to have carried the ruling in that case the other way, to the extent, at least, of that portion of the fund which was earned by the manual labor of the debtor. If it appeared that the money attached represented exclusively the labor of the hirelings, and not at all the manual labor of the contractor, we see no fault in the ruling; but if the earnings of his own hands were in that fund, we see not how Judge Coulter, consistently with the principle of interpretation he lays down, could deny the debtor the protection of the proviso. It is not quite certain, from the report, how the fact was. The amount of work done at the service of the writ was \$110, from which were to be deducted previous payments. Only part of the final balance of \$80 was due when the attachment was laid, and whether any part of this was earned by the manual labor of Chave, the defendant, does not appear. If it was, then *Heebner v. Chave* is not a case to be followed; but if it was not, it is for this reason inapplicable to the case before us, where it appears very clearly that the fund attached—every dollar of it—was earned by the manual labor of Kennedy himself.

This case, though insignificant in point of amount, is said to involve a principle of great importance in the mining districts, and we have accordingly bestowed more attention upon it than its intrinsic merits demanded.

Our opinion is that, under the circumstances of the case the debt was not attachable, and accordingly the judgment is reversed and judgment is entered here for the plaintiffs in error, defendants below, for costs.

RISTO V. HARRIS ET AL.

(18 Wisconsin, 400. Supreme Court, 1864.)

Change of venue. Under Chap. 123, R. S. (2 Tay. Stat. 1424), the application for a change in the place of trial on account of the prejudice of the judge, need not be in the form of a petition. It may be allowed upon affidavit.

Insufficient answer, denying the note sued on but not the labor for which it was given. The complaint alleged that defendants were partners under a certain firm name, engaged in digging gold at Pike's Peak; that one K. was their agent; that plaintiff worked for them, at their request; that plaintiff accounted with said K. as their agent, who had given him, as such agent, a note for the amount due, which note defendants had afterward promised to pay. The answer denied the partnership and the execution of the note, and the authority of the agent, K., in that behalf: *Held*, that judgment was properly rendered against the defendants, they not denying the fact of indebtedness nor the doing of the work at their request, even conceding the fact that they were not partners and that K. had no authority to execute the note in question.

Appeal from the County Court of Milwaukee County

This action was commenced in the circuit court of said county in 1861. The complaint alleges that the defendants, at the times hereinafter mentioned, were partners in the business of gold digging, at Pike's Peak, Colorado Territory, under the style of Harris & Wheeler; that one Kimball was the agent of the defendants in said business, and then and there acted as such; that the plaintiff, at the request of defendants, worked for them in said Territory, in their said business, from November, 1860, to July 27, 1861; that on the last day mentioned the plaintiff accounted with said Kimball, as the agent of the defendants, who was by them authorized, and there was then and there found due from the defendants to the plaintiff for said work, \$255.62; that Kimball thereupon, as such agent and for said defendants, executed to the plaintiff a note at sixty days for the amount so found due (a copy of which note is given and is signed "Harris & Wheeler, G. R. Kimball, Sec'y"); that the defendants have promised to pay said note to the plaintiff, but although said note became due and paya-

ble before the commencement of this action, yet the defendants have not paid the same nor any part thereof; that plaintiff is now the lawful owner and holder of said note, and defendants are justly indebted to him thereon in the sum of \$255.62, with interest from September 28, 1861, for which judgment is demanded.

The defendant Harris answered, denying that the defendants were partners at the time of the execution of the note; denying, also, that said defendants executed said note, or that said Kimball had any authority to execute and deliver notes in the name or in behalf of said defendants. The answer of the defendant Wheeler was similar, except that it did not deny the alleged copartnership.

On the 28th of December, 1863, the plaintiff's counsel, in open court, filed an affidavit of the plaintiff, which states that the affiant "verily believes the judge of this court is prejudiced against him, so that affiant can not receive a fair trial in this action, and he therefore prays that he may have a change of the place of trial of the action;" and they thereupon moved the court for an order changing the place of trial. The order was granted, and the cause was sent to the county court. The plaintiff there moved, "upon the pleadings and record in the action," for a judgment in his favor, and upon his producing in open court and surrendering the note mentioned in the complaint, his motion was granted and judgment was entered against both defendants for the amount claimed. From this judgment the defendants appealed.

N. C. GRIDLEY, for appellants.

SMITH & SALOMON, for respondent.

By the Court, COLE, J.

It is true it was remarked in *Runals v. Brown*, 11 Wis. 185, that the previous provisions of law in regard to a change in the place of trial on account of the prejudice of the judge before whom the cause was pending, had been substantially embraced in chapter 123, R. S., but by this language it was not intended to decide that the application must necessarily be in

the form of a petition. The court was there considering the substance or nature of the proceeding rather than the particular form in which the application was made. Our present statute says: "Whenever any party in any civil action pending in any court of record shall apply for a change of the place of trial of such action, on account of the prejudice of the judge of such court, and shall verify such application by his oath or affidavit, the court shall change the place of trial of such action." Sec. 8, Ch. 123, R. S. In this case, the application, and the grounds upon which it was made, are in the form of an affidavit, and come up fully to the requirements of the statute. We therefore can perceive no error in the manner in which the cause was transferred to the county court.

Nor can we see that there was any error in awarding judgment to the plaintiff upon the pleadings. The answers did not deny that the plaintiff performed work for the defendants at their request, and that they were indebted to him therefor in the amount claimed in the complaint. The plaintiff states distinctly that he worked for them a given period, and that he had an accounting with their duly authorized agent for such services, and the agent gave a note for the amount found due in the name of and in behalf of the defendants. Now, concede that the defendants were not partners in the business of gold digging, and that Kimball had no authority to execute notes for them, still, if the plaintiff performed the services for them alleged in the complaint, this constituted a good cause of action. And the defendants did not deny that this cause of action existed against them, or that they were justly indebted to the plaintiff in the sum for which judgment was demanded.

From the view we have taken of the cause, it becomes unnecessary to notice the preliminary questions raised on the brief of the counsel for respondent as to the regularity of the appeal.

The judgment of the county court is affirmed.

THE WILMINGTON COAL MINING AND MANUFACTURING
CO. V. LAMB.

(90 Illinois, 465. Supreme Court, 1878.)

¹ **Condition in rules allowing miner to leave without notice.** Under a contract for services as miner calling for a set of rules, one of which provided that "any employe wishing in *good faith* to leave" may do so without notice: *Held*, that the contract gave him the right to leave at any time, whether there was *good cause* or not.

Damage can not accrue where special contract allows of the act complained of. Where an employe leaves the service before the expiration of his period of employment under a clause in his contract allowing him such privilege, it is immaterial whether his leaving damaged his employer or not, and the latter can not set off any claim for damages in the action against him for the wages due and unpaid.

Appeal from the Appellate Court of the Second District; the Hon. JOSEPH SIBLEY, presiding Justice, and the Hons. EDWIN S. LELAND and N. J. PILLSBURY, Justices.

This was an action brought by the appellee against the appellant, originally before a justice of the peace, to recover a balance due on wages as a miner. On appeal to the circuit court the plaintiff recovered judgment for \$54.17 and costs. On appeal to the Appellate Court of the Second District, the judgment was affirmed.

GEO. S. HOUSE, for the appellant.

WILLIAM MOONEY and HALEY & O'DONNELL, for the appellee.

Mr. Chief Justice CRAIG delivered the opinion of the court.

On the trial of this cause in the circuit court the appellant asked the witness Whitcomb a question, as follows:

"Now I will ask you, sir, that in consequence of the plaintiff in this case quitting work before the first of May, 1877, it was any damage to the defendant, the company, in this case?"

¹ *Higham v. Wright*, 10 M. R. 24; *Kirk v. Hartman*, 11 M. R. 450.

Appellee objected to the witness answering and the court sustained the objection.

Appellant requested the court to instruct the jury as follows:

"The court instructs the jury that under the contract offered in evidence, if the jury believe that the plaintiff went to work under said contract, then the plaintiff had no right to quit the employment of the said defendant previous to the first day of May, 1877, without good cause."

The court refused the instruction.

The appellee having recovered a verdict and judgment for \$54.17, the appellant appealed to the appellate court, where the judgment was affirmed. The appellant prayed for and obtained an appeal to this court, and it is contended on behalf of appellant that the appellate court erred in affirming the judgment, on the ground that the circuit court erred in refusing to allow the witness Whitecomb to answer the question propounded, and also erred in refusing the instruction asked in its favor.

The action was brought by appellee to recover a balance claimed to be due for services in mining coal in appellant's mine. Appellant claimed that appellee performed the labor under a written contract. This is denied by appellee.

We do not, however, regard it material, so far as the decision of the questions presented is concerned, whether the labor was performed under a written contract or without any contract. Conceding that the services were rendered under the contract as claimed by appellant, did the court err in refusing the instruction and in rejecting the offered evidence? The answer to this inquiry must depend upon the terms and conditions of the contract.

In the first part of the contract it is declared that "the said party of the second part has agreed, and by these presents does agree, to enter into the employment of the said party of the first part as a miner of coal, to commence on the — day of June, A. D. 1876, and continue therein until the first day of May, 1877, and to abide by and adhere to and observe the rules and regulations hereto appended, which are made a part of this contract."

Rule four appended to the contract, which by its terms is a part thereof, declares:

"Any employe may be discharged at any time without previous notice; and any employe wishing in good faith to leave the company's service may do so at any time without giving previous notice, but all arrearages of pay will be due and payable at the next regular pay day after leaving said employment: *provided*, when an employe is discharged by the company, a due-bill maturing on the next pay day, will be given him for his balance."

It appears from the record that appellee quit the service of appellant before the first day of May, 1877, but the record contains no proof that he quit in bad faith or for any evil-disposed purpose. The contract gave appellee the right to leave at any time he saw proper in good faith to do so, and upon leaving, under regulation four, the payment for services rendered would fall due on the next regular pay day.

Under such circumstances the instruction of appellant, which the court refused, was erroneous, for the reason it declared that under the contract appellee had no right to quit the employment of the appellant before the first day of May, 1877, without good cause, when the contract in express terms conferred the right whether there was good cause or not.

In regard to the rejected evidence it is apparent the answer to the question would have been immaterial. It may be true appellant was damaged because appellee quit his service, but when the contract gave him the right to leave at any time he saw proper, the damages could not be set off against the amount which was due appellee.

This disposes of all questions properly presented by the record, and as we perceive no error in the ruling of the appellate court, the judgment will be affirmed.

Judgment affirmed.

SHAFFER ET AL. V. UNION MINING CO.

(55 Maryland, 74. Court of Appeals, 1880.)

Money payment act. A law prohibiting corporations from paying their employes in anything but money is a valid exercise of legislative power.

¹ **Validity of orders drawn against wages.** The act entitled, "An act to prohibit the payment of employes of certain corporations operating in Allegheny county otherwise than in legal tender money of the United States," is constitutional so far as it affects the corporations named, but it was not intended to restrict nor does it restrict the employes from drawing orders on the corporations for wages due in favor of merchants with whom the employes may have run accounts; and such orders being accepted by the corporations constitute a valid assignment of the wages.

Construction favorable to employes. A penal act concerning the mode in which employes are to be paid, is to be construed as passed in the interest of the employe and not so as to qualify powers previously enjoyed by him unless such powers are being used by way of collusion to defeat the operation of the act.

Appeal from the Circuit Court for Allegheny County.

The case is stated in the opinion of the court.

JOHN McCLEAVE, for the appellants.

FERDINAND WILLIAMS, for the appellee.

IRVING, J., delivered the opinion of the court.

This case comes before us on an agreed statement of facts and a waiver of all errors in pleading. The sole object of the suit, it is said, is to obtain a construction of Ch. 273 of the Acts of 1880, and test its constitutionality.

The first section of this act provides, "that every corporation engaged in mining or manufacturing or operating a railroad in Allegheny county and employing ten hands or more, shall pay its employes the full amount of their wages in legal tender money of the United States; and that any contract by or on behalf of any such corporation for the payment of the

¹ Employer not bound by partial assignments in the shape of orders: *Westham Granite Co. v. Chandler*, 4 Mackey, 32; *Carter v. Nichols*, 58 Vt. 553.

whole or of any part of such wages in any other manner than herein provided, shall be and is hereby declared illegal, null and void; and that every such employe shall be entitled to receive from any such corporation employing him, the whole, or so much of the wages earned by him, as shall not have been actually paid to him in legal tender money of the United States, without set-off or deduction of his demand in respect of any account or claim whatever."

The second section creates an exception from the provisions of the first section, and declares that nothing in the first section shall prevent such corporation from demising the whole, or any part of a tenement to its employes, and deducting from the wages the rent thereof, nor for medicine, medical attendance, nor fuel, nor money advanced to procure these several things.

The third section makes payment by consent of the employe in the notes of any bank current in the State at the time at par, as good as if made in legal tender money.

The fourth section declares the making of any contract, or any payment "hereby declared illegal" shall be an indictable offense in any court of competent jurisdiction, and pronounces heavy penalties.

The fifth section makes the act go into effect from the date of its passage. It was approved April 10, 1880.

The conceded facts are as follows: The appellants are merchants who rent their place of business from the appellees; but the appellants and appellees, beyond this relation of landlord and tenant, have no business connection, and neither has any interest in the business of the other. The appellees are a corporation engaged in mining and manufacturing in Allegheny county, and employ more than ten hands. John L. Barrett, being an employe of the appellees on the second day of January, 1878, and for some time previous thereto, and expecting to continue in the employment of the appellees, (which he did until the bringing of this suit,) did on the second day of January, 1878, execute an order on the appellees in favor of the appellants in these words, viz.: "Mt. Savage, January 2, 1878. I, John Barrett, being in the employ of the Union Mining Company, hereby request the said company, through its cashier, to deduct from the moneys now due or

which may hereafter be due me for wages, the amounts now due or which may hereafter be due from me to Messrs. Shaffer & Munn, merchants, as per bills rendered and hereafter to be rendered by said Shaffer & Munn, and to pay over said amounts to said Shaffer & Munn for my account; and I hereby authorize said Shaffer & Munn to receipt for me and in my name for the amount so paid, which receipt shall be final and absolute. This order to remain in full force and effect until countermanded by me in writing and delivered to the cashier of said company; but such countermand shall not affect wages earned by me before the delivery of such countermand, whether such wages are due and payable or not, and such countermand shall not take effect until the claims of Shaffer & Munn are paid in full." This paper was signed and sealed by John L. Barrett in the presence of a witness.

A like order was made and executed on the twelfth day of April, 1880, by James H. Brown, in favor of the appellants, he being admitted to have been, at the time and before, and continuously until suit brought, in the employ of the appellees. Both these orders were accepted by the appellees on the day of their respective dates.

It is further admitted that the appellants, between the 12th day of April, 1880, and the 1st day of May of the same year, sold goods, wares and merchandise to the drawer, John L. Barrett, to the amount of \$51.50 on the faith of his order to the appellants on the appellees, and that the appellees, when called on for payment, refused payment because of the provisions of the act of 1880, chapter 273. It is also admitted that between the first and twelfth days of April, 1880, the appellant sold to James H. Brown goods and merchandise amounting to \$53, when the order was accepted, and that afterward, on the faith of the order, they sold other goods to the amount of \$52. It is also admitted that when demand was made by the appellants, there was enough due each of these assigning employees to pay the appellants' demand. There was a third employe, Wm. M. Johnson, who, on the 1st of May, 1880, had due him from the appellees for his wages, the sum of \$60, which wages, by an assignment in writing in the following words, he passed to the appellants, viz.: "To the Union Mining Company of Allegheny County. For value

received, I hereby assign, set over and transfer to Shaffer & Munn the amount of wages now due me from you to me, being the sum of sixty dollars, for wages for thirty days at two dollars per day, and I do hereby authorize and direct you to pay said sum to Shaffer & Munn, at the next regular pay day of said Union Mining Company of Allegheny County, and I do authorize said Shaffer & Munn to receipt to you for me for said sum." This was signed, but had no seal attached. Payment of this was also demanded and refused. All these employes are citizens of the United States and of the State of Maryland.

It is also admitted that the charter of the appellees, as a corporation, contains a reservation that it may be repealed or amended by the legislature at its pleasure.

Suit was instituted by the appellants in their own name to recover the amounts due respectively on these several assignments.

The *narr.* contained a count on each order and assignment, and it was agreed that all defenses might be admitted under the simple plea of *non-assumpsit*, which was accordingly interposed.

The main questions for consideration are, first, is this act a valid exercise of power by the legislature, so far as it affects the Union Mining Company? and, secondly, if it was constitutional and valid as to the appellees, was it intended to restrict and does it restrict, the powers of the employes of the corporation so as to prevent their assigning what was due them from the appellees to the appellants? and if it was so intended, was it competent for the legislature to impose such restriction?

1. It being conceded that the legislature, when it incorporated the Union Mining Company, reserved the right to alter or amend its charter at pleasure, there can be no doubt that the legislature could enact a law prohibiting the corporation from paying its employes otherwise than in money, and that it could forbid the corporation from making contracts with them for payment in anything but money. It was also entirely competent for the legislature, as one of the means of securing observance of the law, to withdraw from the appellees the right of set-off (in a suit against them for wages) for goods sold their employes in contravention of the act, or

for any other claim prohibited by the act. The acceptance by the corporation of a charter with the reservation of right to alter and amend, made that provision a part of the contract, which, as between the legislature and it, as a private corporation, it must be understood to be. A corporation has no inherent or natural rights like a citizen. It has no rights but those which are expressly conferred upon it, or are necessarily inferable from the powers actually granted, or such as may be indispensable to the exercise of such as are granted. A private corporation is only a *quasi* individual, the pure creation of the legislative will, with just such powers as are conferred expressly or by necessary implication and none others. Whatever, therefore, may have been the mischief intended to be reached and prevented by this law, by restrictions imposed on the corporation, it was competent for the legislature by this law, which operates as an amendment of its charter, to accomplish: *State v. Northern Central R'y*, 44 Md. 131.

2. Having determined that the legislature has the power to control this appellee in respect to its contracts with its employees, and the mode of paying them, the next inquiry is, does this law, by necessary implication, restrict the powers of the employees over their wages—the fruits of their labor—so that they may not assign their wages, as others may their *choses in action*?

This statute was evidently conceived and enacted for the purpose of correcting some evil which had resulted to the employees of such corporations as are described in the act, and perchance to the community also, from the mode in which those corporations have been wont to deal with their operatives. The statute was manifestly intended to be in the interest of the employees. We suppose it must have been intended to protect the employee from future exactions, extortion or over-reaching, supposed to have affected them injuriously in the past. Being protective in its character, it can not have been intended as restrictive of the employee's rights, except in so far as it prevents his colluding with the employer to do what the law forbade the corporation to do. The legislature is always presumed to have intended a constitutional exercise of power, and laws will be so construed as to make their provisions lawful if possible: Cooley's Constitutional Limitations,

221. It can not be supposed the legislature intended to impose a restriction upon these employes, which would have been an unconstitutional invasion of their rights. Judge Cooley, on page 492 of his work on Constitutional Limitations, says: "If the legislature should undertake to provide that persons following some specified trade or employment should not have the capacity to make contracts, or to receive conveyances, or to build houses as others are allowed to erect, or in any other way to make use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislation, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property, in such manner as should be permitted to the community at large, would be to deprive them of liberty in particulars of primary importance to their pursuit of happiness." This is so because equality of rights and privileges is the aim of the law. Judge Sharswood in his note to Blackstone, Vol. 1 page 127, says that "liberty is that state in which each individual has the power to pursue his own happiness according to his own views of his interest and the dictates of his conscience, unrestrained except by equal, just and impartial laws."

Blackstone lays down as one of the absolute rights of an Englishman, inherent in every citizen, "the free use, enjoyment and disposal of all his acquisitions without any control or diminution save only by the law of the land." When he speaks of the control which the law may exercise, he means law which operates equally and alike on all: Sharswood's edition Blackstone, page 138.

To accord to this law the construction contended for by the appellee, and which was given it by the learned judge who decided this case below, would be doing unwarranted violence to the rights of the employes over the fruits of their own labor. It would be preventing their use of their wages, which might have been accumulating in the employer's hands, in the purchase of property, real or personal, and taking conveyance therefor. If the employer should be slothful in payment, it would prevent his employe, however straightened for the want of it, using his overdue wages by transfer, as other peo-

ple do their choses in action. It would have, also, the further effect of preventing other citizens investing their funds in the debts of such corporation, if they should so desire. Such can not have been its intention, and ought not to be held its legitimate result. The last count in the declaration illustrates this aspect of the question exactly. In that count the appellants ask to recover of the appellees the wages of Wm. M. Johnson, amounting to sixty dollars, already earned, and admitted to be due him, which had, by written assignment, been transferred to them for value received, and for which, it may be, they had paid dollar for dollar in money by way of accommodation. That such a claim, although only an open account, is a chose in action, and the subject of assignment within the meaning of the act of 1829, now the 9th article of the code, has never been doubted since the decision of *Craúford v. Brooke*, 4 Gill, 222. If that assignment is not good, and these appellants can not recover on it the amount it represents, it must be because this act of 1880, Ch. 273, has *quoad* this assignor, and such chose in action, and all other assignors and choses in action of exactly the same character, repealed the provisions of the code on the subject of assignments. If it does work such repeal, it does so by necessary implication, for there is no direct assertion thereof in the act. That such was not the purpose of the act, and could not be held to be one of its results, even if such provision were constitutional, we think very evident, when it is considered with reference to what it denounces, and what kind of law it is. It is a penal statute, and must be construed strictly. What it denounces as void is the contract of the corporation to pay its hands in any other way than in money. What it expressly prohibits is the making of such contract with the employe in any other way than as the law directs, and the payment in any other way than it by its terms allows. The making of such contract, or the payment of wages in any other way than the law directs, is made an indictable offense, which is heavily punishable by fine. It is the corporation which is punished, not the employe. The latter is treated as the party injured by the corporation dealing with him in the inhibited way; and he is allowed to recover his wages without abatement for the dealings of the corporation in violation of the act, the corporation

being denied set-off on suit for the wages, except in specified particulars. The wages due this assignor were due in money. There is no pretense that the appellee had made any contract with him for payment otherwise; nor does it appear he was not paid the amount of the assigned bill in money by the assignees. The only ground on which payment of this claim is resisted, is, that in consequence of the provisions of this statute, Johnson has no right to assign his claim to anybody, and the company can lawfully pay nobody but him in person. Such is certainly not a necessary or reasonable implication from the statute. Clearly, this being a penal statute, that will not be an offense under it, which is not expressly within its prohibitions, or necessarily within its spirit. Would the payment of this sum in money to Shaffer & Munn, when presented without suit, have subjected the appellees to indictment and justified conviction under this statute? Every element or ingredient of the offense denounced by this statute is wanting to justify prosecution. It is too plain for argument that in that instance there is not the shadow of ground for conviction. No contract in violation of the statute exists. No payment has been made otherwise than in money, nor will be if the judgment goes and is legally enforced, and there is no reason to suspect collusion. We can not have one rule for construing this statute in its criminal aspect, and another in administering it civilly. The defendants were certainly liable to pay this assignment. The assignee is directed to receipt for the money, the sum assigned, and that receipt would protect the appellee against the assignor to that extent on a suit by employe for his wages. It would be payment *pro tanto*, not set-off. To this extent, at least, there was error in the ruling of the court below.

Applying the same tests to the other counts in the *narr.* which set out the two orders, can recovery be refused? These orders are for the payment of wages already due, and for wages yet to be earned, and to become due; and they also provide that the payees shall receipt in the name of the drawer, and such receipt shall be good and conclusive against the drawer. The fact that wages to be earned, and not then earned, were included in the order, (if there was no collusion to evade the law,) could not affect the recovery for so much

wages as might be due when the order was given, if the un-earned wages were not assignable.

The learned judge who decided this case below, says in his opinion that "the current of authority seems to establish the proposition that such assignments are valid, provided the assignor at the time of the assignment is under a contract of employment, but that if he is not, then the assignment is invalid."

We express no opinion upon that question, because the admission of facts does not meet the requirements of those cases wherein such assignments have been upheld. It does not appear from the evidence that there was such subsisting binding contract for service to be rendered, and payment to be made for it, which binds the employe to render service, and the employer to accept the service and retain in his employ, as has been held, (in those cases affirming such assignability,) to be necessary to support it. In this case, the admission goes no further than to say, that these employes had been in the service of the Mining Company for some time previous to the date of order, and at its date expected to continue therein, and actually did so continue, until suit brought; but it nowhere appears that the Mining Company was under a contract to employ for more than a day. *Non constat*, but he might be discharged any moment. It remains to inquire whether these orders were fraudulent; that is, in evasion or fraud of the law; and were the acceptances by the appellee void because in violation of the law. According to the rule and reasons we have expressed in considering the assignment set out in the third count of the appellants' *narr.* the order and acceptances were not void, and payment of them to the extent that wages had been earned, when the orders were given, must be enforced, unless the facts would warrant a conviction of the appellee for making such acceptance and payment according to it. If it appeared in the proof that the appellee had contracted with these hands that they should take up their wages or any part of them in the store of Shaffer & Munn, by purchasing goods of that firm, so that thereby the hands could not get full payment in money, and so that the Mining Company could thereby get the opportunity of settling business with Shaffer & Munn without the payment of "ready money," we

should have little difficulty in saying such a contract was within the prohibition of the statute, and that the appellants must be held in complicity with an effort to evade the statute, and aiding therein, and would be denied the right to recover. It does not seem to us, however, that such a state of things does exist. It does not positively appear to be the case, and we can not reasonably infer any such arrangement. There may be some suspicion of the transaction, that it was gotten up in evasion of the statute, but there is not proof enough to bring it either within its letter or its spirit. The fact that the store house in which the appellants conduct their business belongs to the appellee, and is rented of it by the appellants, is certainly not enough to prevent their dealing with their landlord's employes, selling them necessities or other property, and accepting from them in payment, orders and assignments on their employers, as we have said other people may legitimately do.

From the bare relation of landlord and tenant, we may not infer a combination to transgress or evade the law, and that fact standing alone, can not render the acceptances void. The acceptances were contracts to pay to Shaffer & Munn the sums they represented, and their payment by appellee will be payment of so much money to the assigning employe, unless the transaction was an intended violation of the statute, and evasion would be held to be so. The proof discloses nothing from which we could find that the hands did not exercise an uninfluenced discretion in dealing with the appellants, nor that the appellee would be setting off as against the employe anything but payments in money. The mention in the orders of bills to be paid by the appellee, was only a mode of stating the amounts to be paid on the order, and for which the appellants were authorized in the name of the assignor to receipt. The bills paid would not be "set-off," but the receipts would be payment of so much money as appellants acknowledged to have received, and would be so received in evidence on a suit for the wages by the employe, under a plea of payment, and could not be excluded, under the facts of this case, without others in aid of them. Under these facts, the appellee could not be convicted, and must be held to his undertaking by the acceptance of the orders. If the employe had sued for his wages, and the appellees had pleaded payment, and to that the

plaintiff had replied that by the contract of service he was bound to take up the amount of his wages, or any part thereof, in the store of these appellants, and to that a demurrer had been interposed, a very different question would be presented, and we might find more difficulty in its decision. Presented as this question is, we think the circuit court erred in deciding that this act of 1880 so far repealed the ninth article of the code touching assignments, as prevent the employes of such companies as are described in the statute from assigning their wages, no matter how *bona fide* the assignment might be, and for that reason the judgment will be reversed and a new trial will be ordered.

Judgment reversed with costs, and new trial ordered.

1. Measure of damages for unjustifiably discharging superintendent of mines employed under special contract: *Tufts v. Plymouth Co.*, 1 M. R. 371; *Williams v. Chicago Coal Co.*, Id. 397; *Saxonia M. Co. v. Cook*, 7 Colo. 569.

2. Lien for day labor and contract work on alternating hirings: *Skyrma v. Occidental Co.*, 9 M. R. 370.

3. A general hiring at a per diem to be paid monthly is a monthly hiring: *Capron v. Strout*, 9 M. R. 391.

4. Where an employe is hired but no work furnished, he may recover: *Martin v. Victor M. Co.*, 8 Pac. 161.

5. Where a foreman advances his own funds to pay the laborers, he may recover against his employers: *Id.*

6. The rate of wages paid in like cases is admissible to prove the reasonable value of wages sued for: *Jenke v. Knott's Mex. Co.*, 58 Iowa, 549.

7. Butty colliers who get coal by the yard, having workmen under them or working themselves personally, are artificers and not contractors under the "Truck Acts": *Bowers v. Lovekin*, 6 El. & Bl. 534.

8. Admissibility of pay rolls; docking for lost time: *Martin v. Victor M. Co.*, 18 Nev. 303.

9. An agreement by the collier to work and by the colliery to not discharge without a month's notice, is not wanting in mutuality and the employer must find work and pay: *Whittle v. Frankland*, 2 B. & S. 49.

10. On a hiring by the day or by the month wages become due at the expiration of the period contracted for. *De Lappe v. Sulliran*, 7 Colo. 182.

CHANDELOR V. LOPUS.

(Croke, Jac. 4; Dyer 75a. Exchequer Chamber, 1 James I.)

¹ Either knowledge or warranty must be averred. Case for selling a jewel, affirming it to be a bezoar-stone when it was not a bezoar-stone. will not lie unless it be alleged that defendant *knew* it was not a bezoar-stone or that he *warranted* it was a bezoar.

Action upon the case. Whereas, the defendant being a goldsmith and having skill in jewels and precious stones, had a stone which he affirmed to Lopus to be a bezoar-stone, and sold it to him for one hundred pounds; *ubi revera*, it was not a bezoar-stone; the defendant pleaded not guilty and verdict was given and judgment entered for the plaintiff in the king's bench.

But error was thereof brought in the exchequer chamber because the declaration contains no matter sufficient to charge the defendant, viz., that he warranted it to be a bezoar-stone or that he knew that it was not a bezoar-stone, for it may be he himself was ignorant whether it were a bezoar-stone or not.

And all the justices and barons (except ANDERSON) held, that for this cause it was error; for the bare affirmation that it was a bezoar-stone without warranting it to be so is no cause of action, and although he knew it to be no bezoar-stone, it is not material, for every one in selling his wares will affirm that his wares are good or the horse which he sells is sound; yet if he does not warrant them to be so it is no cause of action, and the warranty ought to be made at the same time of the sale; as F. N. B., 94 c. & 98 b; 5 Hen. 7, pl. 41; 9 Hen. 6, pl. 53; 12 Hen. 4, pl. 1; 42 Ass. 8; 7 Hen. 4, pl. 15. Wherefore forasmuch as no warranty is alleged they held the declaration to be ill.

ANDERSON to the contrary; for the deceit in selling it for a bezoar, whereas it was not so, is cause of action. But notwithstanding, it was adjudged to be no cause and the judgment was reversed.

¹ Followed, *Kingsbury v. Taylor*, 29 Me. 508; 50 Am. Dec. 608; disapproved, *Bradford v. Manly*, 13 Mass. 143; 7 Am. Dec. 122. See the *Rough Diamond Case*, 64 Wis. 265; 54 Am. R. 610.

BLACKWELL ET AL. V. ATKINSON ET AL.

(14 California, 470. Supreme Court, 1859.)

¹ **Warranty runs with the land.** The vendor of a mining claim sold with warranty is, on the ground of interest, not a competent witness for his vendee on the question of title, the warranty being of real estate and running with the land. With personality the warranty is only to the original vendee.

Appeal from the Eleventh District.

Suit for possession of a mining claim averring plaintiffs to be the owners, and that defendants have ousted them of a portion of the claim. Defendants deny plaintiffs' ownership, and aver that none of them, except Blackwell, ever owned any interest in said claim, until a short time before this suit; and that, although Blackwell did, with others, once own the whole claim, he had abandoned it for a long period; that defendants then took up, according to the mining regulations of the district, the portion of the claim in suit. They further aver that the plaintiffs, other than Blackwell, never did buy the portion held by defendants; that, in fact, their vendors never intended to sell such portion.

The court below, a jury being waived, found the allegations of the complaint to be true, and the allegations of the answer to be untrue, with an exception not material.

Judgment for the claim and \$1,000 damages. Defendants appeal, motion for new trial having been overruled.

JOHN HUME, for appellant, cited 1 Greenl. Ev., Secs. 386, 392, 393, as to the incompetency of Bowman as a witness.

COPE, J., delivered the opinion of the court, BALDWIN, J. and FIELD, C. J., concurring.

On the trial of this case, one Bowman was examined as a witness on behalf of the plaintiffs. During his examination

¹ *Susquehanna Co. v. Quick*, 1 M. R. 202. A covenant to not open a quarry: *Held*, not to run with the land: *Norcross v. James*, 140 Mass. 188.

he stated that he once owned an interest in the mining claims in controversy, but had sold the same to one Bothwell, and had given a bill of sale, in which he guaranteed the title. Bothwell had sold to one of the plaintiffs, and had also given a warranty of title. The question is, whether Bowman was incompetent by reason of his interest.

Section 392 of the Practice Act provides that no person offered as a witness shall be excluded on account of his interest in the event of the action, unless such interest be present, certain and vested. The next section provides that "the true test of the interest of a person, which shall render him incompetent as a witness, shall be that he will gain or lose by the direct legal operation and effect of the judgment, or that the record of the judgment will be legal evidence for or against him in some other action." Wood's Digest, 217.

These provisions are merely declaratory of the common law. "The *true test of the interest* of a witness is," says Greenleaf, "that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest uncertain, remote or contingent." 1 Greenl. Ev., Sec. 390. It is well settled that a vendor with warranty of title, is not in general competent as a witness for his vendee in any controversy concerning the title. Where the action concerns the title to personal property, the rule seems to be that the vendor is a competent witness for a second or any subsequent vendee, the objection going only to his credibility. The reason is that the vendor is liable upon his warranty only to his immediate vendee, and his interest is, therefore, of too remote and contingent a character to constitute a legal disqualification however much it may detract from the credibility of his testimony. But the reason of the rule and consequently the rule itself, have no application where the controversy concerns the title to real estate. In the latter case, the covenant of warranty runs with the land, and the liability of the vendor is directly to the person evicted, and not exclusively to his vendee. His interest in the event of the controversy is, therefore, a present, certain and vested interest. He is bound by his covenant to defend the title or pay the value of the land, and he

will not only gain or lose by the direct legal operation and effect of the judgment, but the record of the judgment will be legal evidence for or against him in any subsequent action for a breach of the covenant. There is nothing in the present case to distinguish it from an ordinary sale of real estate with warranty of title; and it follows that Bowman was improperly admitted as a witness on behalf of the plaintiffs.

Judgment reversed and the cause remanded for a new trial.

WILLIAMS V. HANNA.

(40 Indiana, 535. Supreme Court, 1872.)

Warranty of stock no warranty against corporate debts. A warranty that mining stock transferred, or the title thereto, is free and clear of all incumbrances, debts or liabilities, or an agreement to vest the "clear title" in the purchaser, is in no sense a warranty that the corporation itself is free from indebtedness.

Corporation stocks are transferable in such manner as may be prescribed by the by-laws.

Personal liability act—Effect upon stock. The statutory personal liability of stockholders in mining corporations does not affect the stock itself; and such liability does not, therefore, amount to a breach of warranty against incumbrances, upon a sale by a stockholder by whom such liability has been incurred.

When liability attaches—Transfer. The eleventh section of the act for the incorporation of manufacturing and mining companies provides that "the stockholders of such company shall be individually liable, jointly and severally, for all debts due and owing laborers, servants and apprentices for services rendered, and to other creditors of the company they shall be liable to an amount equal to the stock held by them, respectively." The person holding stock at the time a debt is contracted, is the person who is liable, under the latter clause of this section, to an amount equal to the stock held by him, and a subsequent holder is not liable.

Appeal from the Putnam Circuit Court.

S. CLAYPOOL, J. A. MATSON and C. C. MATSON, for appellant.

¹ *Searight v. Payne*, 18 M. R. 401; *Gifford v. Carrill*, 6 M. R. 558.

S. H. BUSKIRK and J. M. HANNA; for appellee.

WORDEN, J.

This was an action by the appellee against the appellant, upon the following instrument:

"This witnesseth that I, Nathan Williams, of the county of Clay and State of Indiana, in consideration of the sum of twenty-one hundred dollars, to me in hand paid, the receipt whereof is hereby acknowledged by James M. Hanna, of the county of Vigo, and State aforesaid, have this day sold to said Hanna fifty shares of the capital stock of the Indianapolis Coal Company now held by me, being one half of the whole amount of stock by me held in said company; and in consideration thereof I hereby agree and undertake and bind myself as follows, and my heirs, executors and assigns, to wit: First, that on or before the first Monday of January next, I am to transfer to said Hanna, upon the proper books of said company, the aforesaid amount of said stock, so as to vest the clear title in him, and that the same is to be and shall be free and clear of all incumbrances, debts or liabilities; second, that after the time limited in the articles of association of said company for the existence and continuation thereof shall have expired, the said James M. Hanna shall, for the consideration aforesaid, and without the payment of any further sum or sums of money, be entitled to and receive one half of the rights, interests, profits and benefits which would otherwise accrue to me solely in consequence of the dissolution of said association; third, that until the expiration of the time limited in said articles for the existence of said association, the said Hanna, his heirs or assigns, shall, equally with myself, my heirs or assigns, have the privilege and right to dig and mine coal, or cause the same to be done, and the same to transport to market from the said acres of land in said articles of association described, to wit, until the same is exhausted, sharing equally the profits, expenses and losses which may there accrue in working and carrying on said mines and business thereof. For the performance of all which I bind myself, my heirs, executors and assigns, in the sum of twenty-five hundred dollars, to the said Hanna, his heirs, executors or assigns, which said

sum I hereby agree and bind myself shall be considered and recovered as liquidated damages, upon the non-performance or failure to perform this agreement, or any part thereof; fourth, that after the expiration of the time limited in said articles, the said James M. Hanna shall have the privilege of continuing the business of mining and marketing coal, in company with myself, upon as favorable terms as any other person would undertake the same, and shall have the refusal to so continue said business. In witness whereof, I have hereunto set my hand and seal, this 10th day of December, 1855.

(Signed)

"NATHAN ^{his} WILLIAMS."
mark.

"Attest: JOHN W. JONES."

There were five paragraphs in the complaint, all counting upon a breach of that part of the agreement which stipulates for the transfer, by Williams to Hanna, of the fifty shares of the stock of the coal company. It is not alleged that the stock was not transferred at the time specified, but the breach alleged is, that the title was not transferred to the plaintiff "free and clear of all incumbrances, debts and liabilities." The first paragraph alleges, by way of showing a breach of the agreement, that on the 10th of December, 1855, there was a large debt existing and outstanding against said Indianapolis Coal Company, to wit: due to John Woolly & Co., \$4,000; to the Bank of the Capital, \$4,000, and to the Bank of Hartford County, \$4,000; which sums yet remain due and unpaid, being incumbrances and liabilities against said company.

The second paragraph is the same as the first, except that it alleges the indebtedness of the coal company to have been \$10,000, without specifying to whom it was due.

The third paragraph alleges that at the time of the execution of the contract, and continuously thereafter hitherto, the said Indianapolis Coal Company was indebted in the sum of \$10,000, and that because of, and in part satisfaction of said incumbrances, debts and liabilities, the property, effects and assets of the company to a large amount, to wit, the value of \$8,000, were, without the consent of the plaintiff, afterward taken and sold.

The fourth paragraph alleges, in substance, that on the 10th of December, 1855, the Indianapolis Coal Company was in-

debted in the sum of \$10,000; that afterward, on the 3d of July, 1857, for a part of the same debt, the president of the company drew a bill upon the treasurer thereof in favor of John Burke, and that afterward the Bank of Hartford County became the holder of the bill; and that on, etc., the said bank recovered a judgment thereon against said Indianapolis Coal Company, in the Marion Circuit Court, for the sum of \$1,980.65; that on process issued upon said judgment, the effects of said coal company were sold, leaving a part of the debt unpaid; that said judgment and sale of property were in part for the debt and liability which existed at the time of the execution of the agreement sued on. A transcript of the judgment and proceedings thereon is made a part of the paragraph. It is further averred that on the 3d of January, 1856, the defendant pretended to assign to the plaintiff the fifty shares of stock on the books of the company, and represented and pretended to him that the same was free and clear of all debts, incumbrances and liabilities, and caused to be issued to the plaintiff certificates for said stock; that after the proceedings upon, and return of the execution, upon which the effects of the corporation were sold, to wit, on the 20th of December, 1866, the plaintiff tendered and offered to return to the defendant the stock, and proposed to re-transfer the same upon the books of the company, and still proposes and is willing to do so, and brings the certificates into court in pursuance of his offer and tender.

The fifth paragraph alleges the indebtedness of the coal company, as in the fourth; that on the 15th of May, 1858, a judgment was recovered by the Bank of Hartford County against said Indianapolis Coal Company, in the ——— Court of Marion County, for the sum of \$1,980.65, being a part of the debt and liability aforesaid, which judgment remains in full force and in part unsatisfied; that such proceedings were had upon said judgment, that afterward all the personal property and assets of said coal company, of the value of \$10,000, were taken and sold upon an execution issued upon said judgment, leaving unpaid more than a thousand dollars.

Separate demurrers were filed to each paragraph of the complaint, for want of sufficient facts, but were each overruled and exception taken.

Such further proceedings were had in the cause as that final judgment was rendered for the plaintiff below, for the sum of \$2,500, the sum stipulated for as liquidated damages.

Error is assigned, amongst other things, upon the ruling below in overruling the several demurrers to each paragraph of the complaint, and the question meets us at the threshold of the case, whether the complaint, or any paragraph thereof, states any good cause of action, or, in other words, any breach of the contract sued upon.

The several breaches alleged amount to no more than this: that at the time of the transfer of the stock by the appellant to the appellee, the corporation was indebted, and that on such indebtedness judgment has been since recovered against the corporation and its assets sold upon execution issued upon the judgment, leaving a part of the indebtedness unpaid. Is this a breach of the contract?

We have seen that, by the terms of the contract, the stock was to be transferred to the appellee, on the proper books of the company, "so as to vest the clear title in him, * * * free and clear of all incumbrances, debts or liabilities."

The clause of the contract in question, set out in full, reads as follows: "That on or before the first Monday of January next, I am to transfer to said Hanna, upon the proper books of said company, the aforesaid amount of stock, so as to vest the clear title in him, and that the same is to be and shall be free and clear of all incumbrances, debts or liabilities."

What is meant by the phrase, "the same is to be and shall be free and clear of all incumbrances, debts or liabilities?" We suppose it to mean that the title to the stock should thus be free and clear. This is in accordance with the authorities. Says Chancellor Kent: "The relative same refers to the next antecedent though the word said does only when the plain meaning of the writing requires it." 2 Kent Com., 555. It is either the stock, or the title thereto, which was thus to vest in the appellee, that was thus to be free and clear of incumbrances, debts or liabilities. Upon a superficial view, or at the first blush, it might seem to make no difference whether we regard the contract as stipulating that the stock should be free and clear, or that the title thereto, to be vested in the appellee, should be free and clear of all incumbrances, debts or lia-

bilities. But there may, perhaps, be a difference. The stock may itself be free and clear of all debts, incumbrances or liabilities, while the holder of the title thereto might be subjected to liabilities as such holder, which would not attach to the stock.

We may assume, for the purposes of the case (and this construction is most favorable to the appellee), that the contract means that the title to the stock, which was to be vested in the appellee, was to be free and clear of all incumbrances, debts or liabilities that could attach to the stock itself, or to the appellee personally in consequence of becoming the purchaser thereof and being invested with the title thereto.

We do not decide that the stipulation is broad enough to cover personal liabilities attaching to the appellee in consequence of his purchase of the stock, but that may be conceded for the purposes of the case.

We are of opinion that the contract can not be construed as an agreement on the part of the appellant, that the corporation itself should be free from incumbrances, debts or liabilities, unless those incumbrances, debts or liabilities attached to the stock transferred to the appellee, or to him personally as the holder thereof. To give it such effect would be making a new contract for the parties by construction. They have not, in the contract set out, employed any language that embraces such an idea, nor is there anything in the nature of the transaction that warrants such construction.

These stocks are personal property, and are transferable in such manner as may be prescribed by the by-laws of the corporation: 1 G. & H. 426, Sec. 7. Corporation stocks are the subject of daily sale and transfer, and may be worth their par value, or more, though the corporation itself may be largely indebted. A warranty that stock transferred, or the title thereto, is free and clear of all incumbrances, debts or liabilities, is in no sense a warranty that the corporation itself is free from indebtedness.

Nor are there any extraneous facts or circumstances alleged in the complaint, if such existed and could be alleged, that would justify such construction.

Having settled the construction of the contract, so far as it is necessary to do so, we proceed to inquire whether the com-

plaint alleges any breach thereof, as thus construed. There is no complaint that the stock itself was subject to any incumbrances, debts or liabilities, nor that the appellee did not receive a clear title thereto. But it is claimed that the appellee, by becoming the holder of the stock, became liable for the debts of the corporation to the amount of his stock, and hence, that he did not receive the title to his stock free and clear of all debts and liabilities.

This argument is based on the eleventh section of the act for the incorporation of manufacturing and mining companies, etc. (1 G. & H. 425), which provides, that "the stockholders of such company shall be individually liable, jointly and severally, for all debts due and owing laborers, servants and apprentices, for services rendered; and to other creditors of the company they shall be liable to an amount equal to the stock held by them respectively."

It does not appear that any part of the debts complained of was due, either to laborers, servants or apprentices for services rendered; hence the branch of the section relating to that subject may be dismissed at once.

But the stockholders are made liable to other creditors, to an amount equal to the stock, held by them respectively. The question arises, when must the stockholder have held the stock in order to make him liable? Must he have been a stockholder at the time the debt was contracted? Or may he be held liable if a stockholder at the time of suit brought to recover the debt? Or is he liable if, between the time of contracting the debt and the bringing of an action against stockholders to recover it, he has purchased and again sold the stock?

We think we may well say, as a step in the solution of these questions, that the legislature evidently intended to make the stockholders, viewed collectively, individually liable for the debts of the corporation to an amount equal to all the stock issued, and no more. It is clear that the body did not intend to make two or more successive holders of the same stock, each liable to the amount thereof. In other words, it was not intended to make a given amount of stock the foundation of a liability greater than the amount of the stock. But if each successive holder of the same stock is to be held liable for the

debts of the corporation to an amount equal to the amount of his stock, then the stockholders may, taken as a whole, be liable for a much larger amount than the stock issued. We can not so construe the statute in question. We must hold that the legislature intended to make those, who were stockholders at the time any given debt was contracted, and those only, liable therefor; or we must hold, that they intended to make those, and those only, liable, who might be stockholders at the time of an action, brought against stockholders to recover any given debt of the corporation. One of the points of time must have been intended, when the stock was to be "held" in order to create the liability.

We think the more reasonable interpretation, and that most in harmony with the general spirit and analogies of the law, is to hold that the former period of time was intended. We are of opinion, therefore, that under the statute in question, one who is a stockholder in such a corporation at the time of the contracting of any given debt by the corporation, is liable for that debt to the amount of his stock; but that one, who becomes a stockholder subsequent to the contracting of the debt, does not become liable therefor to the amount of his stock, or otherwise, by reason of becoming such stockholder. In short, we think every stockholder in such corporation is individually liable to the amount of his stock for all debts contracted by the corporation during the time he was such stockholder, and none other. This renders the liability of such corporators, to the extent of their stock, similar to that of partners. The outgoing partner is not released from his liability by going out of the firm, nor is the incoming partner responsible for the debts of the firm, contracted before he became a partner.

This view is fully sustained by the authorities. The case of *Moss v. Oakley*, 2 Hill, 265, is exactly in point in principle, though the provision of the statute was different, in this, that it made the stockholders liable for the debts of the corporation, and not merely to an amount equal to their stock. See also, *Adderly v. Storm*, 6 Hill, 624, and *Rosevelt v. Brown*, 11 N. Y. 148, where the prior cases are referred to.

We may add that, independently of any authority, the above, in our opinion, is the true interpretation of the statute

in question. The holder of stock in the corporation has a voice in conducting the affairs of the corporation, so far, at least, as the selection of its officers is concerned, and has the means of knowing the situation of its affairs and business, and he should not be permitted to avoid his liability for the debts of the corporation by transferring his stock to another person. On the other hand, the purchaser of stock who has previously had no connection with the corporation, has not the means of knowing very definitely the amount of debts owed by the corporation. He may know the market value of the stock, but this furnishes no very safe criterion by which to determine the amount of indebtedness. The creditor, if he looks to the individual liability of the stockholders at all, looks to those who are stockholders at the time he lends his credit, and to those he should be content to look for the collection of his debt.

Applying these views to the case under consideration, we see that the appellee Hanna was subjected to no liability whatever for the previous debts of the corporation by his purchase of the stock; nor did the appellant Williams, relieve himself of his liability for such previous debts by transferring the stock to Hanna. The appellee, then, received the title to his stock free and clear of all incumbrances, debts or liabilities, and the matters alleged in the complaint do not constitute a breach of the contract. The demurrers to the several paragraphs of the complaint should have been sustained.

The judgment below is reversed, and the cause remanded for further proceedings in accordance with this opinion. The appellee, having departed this life since the submission of this cause, it is ordered that judgment herein be rendered as of the term at which the cause was submitted.

BUSKIRK, J., having been of counsel, did not sit.

STAMBAUGH, Executor, v. SMITH.

(23 Ohio State, 584. Supreme Court, 1873.)

In an action on a covenant against incumbrances it is not necessary to aver or prove an eviction.

Covenant of seizin. In an action upon the special covenant of seizin in a deed, a breach is not sufficiently shown by an averment negating the legal seizin of the covenantor at the time the covenant was made, but his seizin in fact must also be negatived.

Covenant against incumbrances. A covenant against incumbrances is broken as soon as made, if an incumbrance in fact exists; but in an action for breach thereof only nominal damages can be recovered unless it be shown that the covenantee has removed the incumbrance or has been disturbed in his possession.

Exception in covenant strictly construed. The exception in the covenant, "that the said premises are free from all incumbrances whatsoever, except a claim which J. W. has on said land for iron ore," can not be extended beyond the plain and ordinary meaning of the words, and will not be construed to except the entire claim of J. W. under a deed which has been a matter of public record for many years and which includes both iron ore and coal, with the further privilege of roads.

The coal privileges and right of way are incumbrances within the meaning of the covenant.

Defense affecting only the measure of damages. In an action for breach of covenant against incumbrances based upon the fact that there was an outstanding coal privilege in the land, the answer set up that there was no coal in the land, and that the plaintiff had never been evicted, etc.: *Held*, That these matters could not defeat the plaintiff's right to recover, but related solely to the measure of damages.

Practice—Suit against executor. In an action against the executor of an estate it must appear that the executor had rejected the plaintiff's claim before suit, but the statute does not require the indorsement of such rejection upon the claim nor a specific demand for an indorsement or its allowance.

Existence of coal bed, how proved. For the purpose of proving the existence, quantity and quality of coal on certain premises, it is competent to show that coal seams of a certain thickness and quality exist on other lands in the vicinity, and the opinions of geological experts that coal of similar quantity and quality exist on the premises in question.

Uncertainty in description. A deed containing the following description: "All my interest in real estate, easements and rights to dig and mine coal in Mahoning county, Ohio, conveyed to me, and now owned, held and enjoyed by me from William Buchanan," is sufficiently certain as to intention, and parol evidence will be admitted to identify the property.

¹ *Carr v. Benson*, L. R. 3, Ch. App. 524; *Skidmore v. Eikenberry*, 15 M. R. 360.

Damages after suit brought. In an action for breach of a covenant against incumbrances, money paid for a deed releasing certain incumbrances after suit brought may be recovered, and the deed may be introduced in evidence.

Void cancellation of incumbrance. An incumbrance upon land in the nature of a coal lease held by McC. in trust for the firm of McC., B. & Co., can not be canceled and annulled by an instrument signed by the firm name, and money paid for such an instrument can not be recovered in an action upon a covenant in a prior deed against incumbrances.

Error to the Common Pleas of Mahoning County. Reversed in the District Court.

The original action was commenced in 1865, by defendant in error against the plaintiff in error, to recover damages for the breach of the covenants in a deed for the conveyance of land, executed by William Buchanan in his lifetime, to wit, April 7, 1854. The alleged breach was the existence of an outstanding superior title to a part of the premises at the time the deed was executed.

During the progress of the cause, divers exceptions were taken by the defendant.

Judgment was finally rendered in favor of the plaintiff below; and this proceeding is prosecuted by defendant below to reverse the judgment on the ground of errors which are alleged to have intervened during the progress of the cause:

1. In overruling the demurrer to the petition.
2. In sustaining the demurrer to the first answer.
3. In admitting incompetent testimony.
4. In the charge to the jury.
5. In overruling motion for new trial.
6. In rendering judgment for plaintiff below.

D. M. WILSON, for plaintiff in error.

Under the conveyance to him, Wilkinson held only the title to the coal and ore, and until eviction from some part thereof, the defendants in error could not maintain their action: *Caldwell v. Fulton*, 31 Pa. St. 475; *Harlan v. Lehigh Coal Co.*, 35 Id. 287; *Armstrong v. Caldwell*, 53 Id. 284; *Innes v. Agnew*, 1 Ohio, 386; 10 Ohio, 317, 331; *Robinson v. Neil*, 3 Ohio, 525; *King v. Kerr*, 5 Ohio, 154; *Tuite v. Miller*, 10 Ohio, 382; *Boyd v. Longworth*, 11 Ohio, 235, 253; *Devore v. Sunderland*, 17 Ohio, 52; *Johnson v. Nyce*, 17 Ohio,

66-69; *Nyce v. Obertz*, 17 Ohio, 71; *Hill v. Butler*, 6 Ohio St. 207; *Picket v. Picket*, 6 Ohio St. 525; 11 Ohio St. 616, 622; 2 Washb. on Real Prop. 715, and par. 24, 27, 28; also p. 706, par. 13.

Exhibit "C" was improperly admitted in evidence: S. & C. 582; *Keenan v. Saxton*, 13 Ohio, 41.

The words of the exception in the deed to Smith are words of description of the lease to Wilkinson, and in effect excepted and reserved the entire lease: 1 Hill on Vend. 401, 403, 409, Sec. 15.

The claim is stale and equity will not enforce it: 1 Fonb. Eq. b. 1, Ch. 6, Sec. 2; Will. Eq. Jur. 291, 292, and citations.

GEORGE M. TUTTLE, for defendant in error.

After the conveyance to Wilkinson, neither Buchanan nor his later grantee, Smith, had seizin or actual possession of the mines adverse to Wilkinson. No eviction of Smith could occur until after such seizin or actual adverse possession by Smith. Hence the averment of actual eviction was unnecessary. Possession and use of the surface of the land over the mines was not inconsistent with the rights of Wilkinson, and he could base no action thereon to evict Smith: See Collett, J., in *Winton Lessor v. Cornish*, 5 Ohio, 477; 1 Washb. on Real Property, 44, Sec. 77 (marg. p. 34); *Backus v. McCoy*, 3 Ohio, 211, 221; *Hill v. Butler*, 6 Ohio St. 217; *Simpson v. Hawkins*, 1 Dana, 309; *Arnold v. Stevens*, 24 Pick. 106; 2 Washb. on Real Prop. 340, Sec. 56.

The deed to McCreary, Bailey & Company was sufficient to vest the rights of the partnership in Smith: *Purviance v. Sutherland*, 2 Ohio St. 478; *McNaughten v. Partridge*, 11 Ohio, 223; Pars. on Part. 183, and note m.; Story on Part. *supra*; 3 Kent, 48, 49.

McILVAINE, J.

The overruling of the demurrer to the petition is assigned for error. The demurrer was taken on the ground that the petition did not state facts sufficient to constitute a cause of action. The first point made under this assignment is that the petition did not state that the plaintiff had been evicted under the alleged outstanding paramount title.

The deed from Buchanan to plaintiff below, upon which suit was brought, contained the usual covenants, all of which were specially set out in the petition; and among others, a covenant of seizin, a covenant against incumbrances and a covenant of general warranty. The petition also averred the existence of a paramount title to a portion of the premises outstanding at the time the covenants were made.

Now, if it turns out that the plaintiff below was not entitled to judgment on any of the covenants contained in the deed without showing an eviction, the demurrer was well taken; for, in our opinion, the facts stated in the petition did not show an eviction, either actual or constructive.

The claim of the defendant in error is that the facts stated in the petition constitute a cause of action on the covenant of seizin, and that an averment of an outstanding superior title to a part of the premises described in the deed at the time the covenant was made, is a sufficient statement of a breach of that covenant to entitle the plaintiff to recover as damages the full consideration paid for that portion of the premises of which the covenantor was not, in law, seized at the time of the conveyance.

The doctrine that seizin in fact is a compliance with this covenant, and that no right of action accrues thereon until the covenantee, who was put in possession under his deed, has been evicted by him who was seized in law, has been fully settled in this State. It was first maintained in *Backus v. McCoy*, 3 Ohio, 211, and soon after that decision was followed in *Robinson v. Neil*, 3 Ohio, 525. It was again considered and approved in *Foot v. Burnet*, 10 Ohio, 317, and again in *Devore v. Sunderland*, 17 Ohio, 52. These decisions have become a rule of property in this State, and must be followed under the rule of *stare decisis* if they can not be sustained upon any other grounds.

It follows, therefore, that in an action upon the special covenant of seizin, a breach is not sufficiently shown by an averment negating the legal seizin of the covenantor at the time the covenant was made, but his seizin in fact must also be negated. There is no averment in this petition that the covenantor was not in fact seized at the time he executed the deed.

I have been thus particular in showing that the petition

could not have been sustained upon the theory that the action was based on the covenant of seizin, for the reason that several other questions in the case are thereby put at rest.

Regarding the action below, however, as based on the covenant against incumbrances, a breach was sufficiently stated in the petition. The covenant against incumbrances is broken as soon as made if an incumbrance in fact exists; and a right of action thereon immediately accrues to the covenantee, at least for nominal damages. But in such action more than nominal damages can not be recovered, unless the covenantee has removed the incumbrance, or it be shown that his possession has been disturbed, or his use or enjoyment of the land has, in some way, been interfered with by reason of the incumbrance.

It is also claimed by plaintiff in error that the alleged incumbrance was excepted from the covenant against incumbrances. (This question was raised in the court below upon the charge of the jury, but it is more properly considered here, as all the facts bearing upon the question are found in the petition.)

The covenant was made in these words: "And I, William Buchanan, do, for myself, my heirs and administrators, covenant with the said Thomas Smith, his heirs and assigns, that the said premises are free from all incumbrances whatsoever, *except* a claim which John Wilkinson has on said land *for iron ore.*"

The alleged incumbrance was a coal right or interest and privileges conveyed by William Buchanan to John Wilkinson, on the 14th day of May, 1845. The following are all the material terms of that conveyance, to wit:

"In consideration of the premises and of the sum of twenty-five cents, to me in hand paid by the said Wilkinson, and the further sum of five dollars per acre for each acre of ore and coal taken and used from the lands hereafter described, agreed to be paid by the said Wilkinson, so fast as the same shall be used and determined by measurement, I, William Buchanan, have granted, bargained and sold, and by these presents do give, grant, bargain, sell and convey unto the said Wilkinson, his heirs and assigns, all the iron ore and coal upon the lands following, to wit" (describing the lands mentioned in the petition among others): "Together with the privilege of entering upon said lands, excavating, digging and mining for the

said ore and coal, and preparing the same; and also the further right and privilege to construct, repair and use such roads and ways as he or his assigns may deem necessary for the removal of said ore and coal from off said lands, together with the like right of way over any adjoining lands owned by me for the same purpose; to have and to hold to him, the said John Wilkinson, his heirs and assigns, forever."

The exception to the covenant should not be extended by construction beyond the plain and ordinary meaning of its terms. The interest of Wilkinson in the coal situate in or upon the lands conveyed, was not in terms excepted, nor the servitude imposed upon the premises for excavating and removing the coal. The terms of the covenant against incumbrances, clearly embraced the whole of Wilkinson's claim under his deed of May 14, 1845; and whatever exception therefrom the covenantor intended to make should also have been clearly expressed. It is more reasonable to suppose that the covenantor expected to procure from Wilkinson a release of his coal interest, or intended to run the risk of the claim ever being asserted against the land, than it is to suppose that the covenantee intended to except from the operation of the covenant an interest clearly within, not only the terms of the grant, but also the terms of the covenant itself.

In this connection it is suggested in argument that the words, "except a claim which John Wilkinson has on said lands for iron ore," were used by the parties to designate the deed which Wilkinson held, and that the true intent of the parties was to except the whole of his claim under that deed from the operation of the covenant. And it is further claimed that this construction is fair and reasonable, in consideration of the fact that that deed had been a matter of public record for many years before the making of the covenant in question. We can not see how the fair and natural import of the words can be departed from. The fact named can have no such influence. If it were shown that the Wilkinson deed had been before the parties at the time the exception was made, the conclusion would be inevitable that the omission of the coal privilege was intentional, for then there would be no suspicion of mistake. If its contents were not known, it would be violent to presume that the parties intended to except the whole claim of Wilkinson under his deed, which would have

been the effect of the exception had the words, "for iron ore" been omitted. It was the addition of these words, "iron ore" that excludes the presumption that "coal" also was intended to be excepted.

It is also claimed by plaintiff in error, that the interest in the coal and coal privileges, acquired by Wilkinson under his deed, does not constitute an incumbrance within the meaning of this covenant.

The deed purports to "give, grant, bargain, sell and convey" all the iron ore and coal upon the premises, together with the privilege of entering on the lands, excavating and mining for coal and iron ore, with the further privilege of roads and ways. A vested interest in a part of the land, and an easement in the balance, accrued to Wilkinson upon the delivery of the deed; and although it may be true that the title to the coals in place vested absolutely in the purchaser, yet from the nature of the property the only valuable or profitable exercise of the rights of ownership consisted in the right to remove the coal and ore. The right to remove them must have been the sole inducement to the purchase, as dominion in fact could be exercised over them in no other way; and when removed the entire estate in the lands is left in the grantor of those succeeding him in the estate.

The right or interest thus conveyed to Wilkinson, we think, fairly comes within the most approved definition of an incumbrance, within the scope and meaning of this covenant: namely, "every right to or interest in the land which may subsist in third persons, to the diminution of the value of the land but consistent with the passing of the fee by the conveyance." Rawle on Cov. 95, and cases cited. Within the authority of decided cases the right to cut and remove growing trees is an incumbrance: 22 Pick. 447; 97 Mass. 195; 6 Allen, 420. A right of dower either inchoate or consummate: 3 Zab. 260; 8 Ala. 373; 2 Greenl. 26; 49 N. H. 549. A private way: 46 Penn. St. 229; 2 Allen, 598; 15 Pick. 68; 5 Conn. 497. A lease for years: 2 Speers, 649. A contract of sale: 1 Rawle, 382. A right of way for railroad: 24 Iowa, 69, etc.

The demurrer to the petition was properly overruled.

The next assignment for error is based on the sustaining of the demurrer to the original answer of the defendant below.

The answer was as follows, to wit:

"1. The said defendant for answer to said petition, says that he denies that said pretended coal lease to said Wilkinson is or ever was an incumbrance upon said premises, for there is not now, nor was there at the time of executing said pretended lease, nor at the time of the execution of said deed to said plaintiff, nor at any other time, any coal in or upon said premises; and that, therefore, said pretended lease could not convey any right to mine or remove coal therefrom, and could not be an incumbrance.

"2. As a second ground of defense he says that neither said Wilkinson nor any one holding under him by virtue of said pretended lease ever evicted said plaintiff from said pretended coal right or interest, nor ever took possession of said pretended coal interest, nor of said premises, nor any portion thereof, for the purpose of taking possession of said coal or coal interest, or searching or prospecting therefor; and, in fact, no possession of or interference with said premises has ever been taken or made in or upon said premises under said lease whatever.

"3. As a third ground of defense, the said defendant says that he denies that said plaintiff paid McCreary, Bailey & Co. \$885.44, or any other sum, in order to procure a release or cancellation of said pretended coal lease, and denies said pretended expenses; and also says that said coal interest or pretended coal lease is and ever was entirely valueless and worthless, and that said pretended cancellation, dated April 20, 1865, is without any consideration and void, and only gotten up and obtained as a speculation and a fraud upon the estate of said William Buchanan, and he further denies that said pretended paper is a cancellation of said coal interest."

From the view we take of the cause of action stated in the petition, and have already expressed in disposing of the former assignment of error, it follows that the matters set up in this answer could not have defeated the plaintiff's right to recover, as they relate solely to the measure and amount of damages. And again, to the fullest extent that the facts therein stated constitute proper matter for pleading, the defendant had the full benefit of them in his amended answer wherein they were re-stated.

The next assignment is that the court erred in permitting

incompetent evidence offered by the plaintiff below to go to the jury.

1. It appears from the bill of exceptions, that the court permitted the plaintiff below to offer in evidence, against the objection of the defendant, a written statement of his claim or account duly authenticated, as required by section 85 of the "Act to provide for the settlement of the estates of deceased persons." S. & C. 581.

The purpose for which this instrument was offered, or the ground of objection to it, does not appear in the record.

A copy of the instrument was attached to and made part of the petition, which contained the following averments in relation to it, viz.: "And the said plaintiff further saith, that upon the 12th day of April, 1865, he presented to the said Jeremiah Stambaugh, executor of the last will and testament of the said William Buchanan, deceased, defendant, his account, duly verified according to law, for the amount so as aforesaid paid to remove said incumbrance by coal lease, and for said necessary expenses incurred in the removal of the same. A copy of which, with the indorsements thereon written, is hereunto attached and made a part of this petition, marked "Exhibit C," and demanded acceptance and payment thereof, which was refused, although the same is due and payable by said defendant in his capacity as executor, by reason of the premises above set forth."

In argument the ground of the objection to this evidence is stated to be, that the rejection or disallowance of the claim by the executor was not indorsed upon it, and that there was no averment in the petition that he had refused to indorse his allowance or rejection on demand being made for that purpose. It is claimed by plaintiff in error, that, on the authority of *Keenan v. Saxton*, 13 Ohio, 41, an action can not be maintained against a decedent's estate until the claim has been duly presented for allowance, with a specific demand that its rejection or allowance be indorsed thereon. We do not conceive that by the statute (Sec. 90 of the Act of March 23, 1840, S. & C., 582), or under the authority of the case referred to, the right to sue depends upon an indorsement on the claim of its disallowance, or upon the fact that the creditor has made a specific demand that the allowance of the claim be indorsed thereon. That an unequivocal rejection of the claim shou'd

be obtained before suit, is undoubtedly true; but the only purpose of the last clause in the section of the statute referred to, is to make a refusal on the part of the executor or administrator to indorse his allowance, when demand is made for that purpose, conclusive proof of its rejection.

The averment in the petition in relation to the presentation and rejection of the plaintiff's claim was sufficient; and although there was no necessity for proof as the pleadings stood (there being no denial of the averment), still, we think, there was no error in admitting the evidence.

It is also claimed that the court erred in admitting certain testimony offered by the plaintiff for the purpose of proving the existence, quantity and quality of coal on the premises in question. The testimony objected to was to the effect that coal seams of certain thickness and quality had been discovered and mined upon other lands in the vicinity, and the opinions of witnesses who claimed to have knowledge of the geological structure and formations of the neighborhood, that coals of like quantity and quality existed on the lands in question.

We think there was no error in the admission of such testimony. It tended to establish the facts for which it was offered.

For the purpose of showing that the incumbrance complained of had been bought in and extinguished by the plaintiff below, he offered in evidence certain deeds and records of deeds, purporting to transfer and convey the estate and interest constituting the alleged incumbrance as follows, to wit:

1. The deed from William Buchanan to John Wilkinson, dated May 14, 1845.

2. The record of a deed from John Wilkinson to John M. Crawford, dated January 16, 1858.

To the introduction of this record the defendant excepted. The point made is that the deed was insufficient to pass title by reason of uncertainty in the description of the property. The description is as follows: "All my interest in real estate, easements and rights to dig and mine * * * coal in Mahoning county, Ohio, conveyed * * * to me, * * * and now owned, held and enjoyed by me * * * from William Buchanan." There was no error in admitting this evidence.

There is no uncertainty as to intention, and parol evidence

was admissible to identify the property intended: *Barton v. Morris*, 15 Ohio, 408.

3. The record of a deed from John M. Crawford and others to George W. Crawford, dated March 10, 1856.

4. The record of a deed from George W. Crawford and others to John H. McCreary, dated May 2, 1864.

5. A deed from John H. McCreary to William McCreary, Lawrence P. Hitchcock, John S. Dilworth, James M. Bailey and John H. McCreary, constituting the firm of McCreary, Bailey & Co., dated June 11, 1867.

This deed was objected to on the ground that it was executed after the commencement of the action. This objection was not well taken.

The gist of the action on this covenant is the existence of an incumbrance at the time the covenant was made; and the measure of damages is compensation for injuries sustained previous to the date of the recovery. Money paid for the removal of the incumbrance after the commencement of the action may be recovered: *Kelly v. Low*, 18 Me. 244; *Leffingwell v. Elliott*, 10 Pick. 204; *Brooks v. Moody*, 20 Pick. 474; *Mosely v. Hunter*, 15 Mo. 322. This rule has been applied generally, in cases where the incumbrance was removed by the mere payment of money, but we can see no reason why it is not applicable as well in cases where the extinguishment can be effected only by purchase and deed of release. In both classes of cases the covenantor is alike protected from further liability on the covenants in his deed, and the covenantee is simply put in possession of the fruits of his contract, without further delay or multiplicity of actions.

The plaintiff then offered in evidence, under exception, an instrument, of which the following is a copy. This instrument was written on the back of the deed from Buchanan to Wilkinson, to wit:

"In consideration of \$958.33, received of Ebenezer S. Cowden, and \$1,051.67, received of Thomas Smith of the aggregate amount, of which \$1,700 is for coal interest (as shown, of which for coal interest \$885.44 was paid by said Smith, and \$814.56 was paid by said Cowden), and \$300 for ore interest, conveyed by the within lease, we, McCreary, Bailey & Co., covenanting that, as owners and holders of said said lease, we

have a good right to release, cancel and annul the same, do hereby cancel and forever annul said lease, as fully as though the same had never been executed.

"In testimony whereof we have hereunto set our hand and seal, this 12th day of April, in the year 1865.

"MC CREARY, BAILEY & CO. [SEAL.]

"WITNESS: JOHN MCCLAIN, WILLIAM WATSON."

"STATE OF OHIO, Mahoning County, ss.

"Before me, William Watson, a justice of the peace in and for said county, personally appeared William McCreary, of the above firm of McCreary, Bailey & Co., and acknowledged the signing and sealing of the above instrument to be their voluntary act and deed, for the purposes therein mentioned, this 20th day of April, A. D. 1865.

"WILLIAM WATSON.

"Justice of the Peace."

Although the record does not purport to contain all the testimony offered on the trial, yet it does clearly show that the title constituting the incumbrance complained of, was held by John H. McCreary in trust for McCreary, Bailey & Co., at the time this instrument was executed. And that this instrument was ineffectual to transfer the title so held, is a proposition too plain for discussion. Nor was the defect in the transmission of the title to the plaintiff cured by the subsequent conveyance by the trustee to the individual members of the firm for which he was trustee.

The objection to this evidence is that the instrument was wholly inoperative in law to transfer or release the incumbrance because the firm of McCreary, Bailey & Co. was not capable in law of either holding or transferring the title in or by the name of the firm.

We have already said that the covenant upon which suit was brought was broken as soon as made, if an incumbrance upon the land in fact existed. The plaintiff below was entitled to recover nominal damages upon proof of the execution of the deed and the existence of the incumbrance, but beyond nominal damages he was not entitled to recover without proof of special injury. Upon breach of the covenant against incumbrances there is no presumption of actual damage for the reason that no such damage necessarily accrues on the breach. Yet it may accrue in various ways. The covenantee may be

obliged to remove the incumbrance in order to save his estate; he may be evicted under it or he may be subjected to loss and inconvenience in the use and enjoyment of the estate. In this case, for the purpose of showing special injury, he alleged in his petition that he had paid to McCreary, Bailey & Co., the then owners of the incumbrance, the sum of \$885.54 in order to remove the same and that the same had been extinguished by means of the instrument in question.

Now, as this instrument was not competent to prove the payment of the money, or the extinguishment of the title, and as it could have been used for no other purpose, it was improperly admitted.

It is suggested, however, that inasmuch as this instrument tended to prove an equitable title in the plaintiff, and as for aught that appears in the record other and competent proof of the extinguishment of the legal title may have been offered, there is no error to the prejudice of the defendant below manifest in the record.

In the face of the averment in the petition that the incumbrance was removed by the instrument in question we can not assume that other and competent evidence of its extinguishment was offered; but, be that as it may, it is a sufficient answer to the suggestion to say that the ownership of the equitable title to the incumbrance was not the question involved in the issue, but the question upon which the right of the plaintiff below to recover actual damages depended, was whether or not the legal title to the incumbrance had been extinguished. On this question the evidence objected to may have been and probably was considered by the jury, and for that reason the judgment should be reversed.

In conclusion I may add that in a case like the present where the only claim for actual damages consists of expenses incurred in removing the incumbrance the covenantee in order to recover such damages must show that the legal title to the outstanding estate has been extinguished, so that the covenantor may not in any event be again prosecuted on account of the same defect in the warranted title by an action on other covenants in his deed, after the eviction of a subsequent grantee of the estate at the suit of an innocent purchaser of the outstanding title.

Judgment reversed and cause remanded for a new trial.

PEARSON V. MARTIN.

(38 Wisconsin, 265. Supreme Court, 1875.)

¹ **Warranty of quality, by comparison—Mistake.** Where, upon a sale of coal, the vendor warranted that it should be "of good and of as good quality as" certain coal then being landed "at the mills of Havens," in the same city, this was a warranty of the good quality of the coal, even though it appeared that there were no such mills as those called for in the terms of the warranty.

Appeal not dismissed for neglect of rules. This court will not dismiss an appeal for want of compliance with its rules as to mode of preparing the printed case, but will make such order as may be proper, of its own motion.

Appeal from the Circuit Court of Milwaukee County.

The complaint alleges that on the 15th of October, 1873, the plaintiff sold and delivered to the defendant 340 $\frac{1510}{1000}$ tons of Straightville nut coal, of the value and at the agreed price, including freight and trimmings thereon, of \$1,625.39; and that no part of such sum has been paid to the plaintiff. Judgment is demanded for the aforesaid sum, with interest thereon from the aforesaid date, together with the costs of the action. A computation will show that the price per ton demanded is \$4.77.

As a defense to the action the answer sets up the breach of an alleged warranty by the plaintiff that the coal which the defendant agreed to purchase "was to be of good quality, and of as good quality as the coal there before the 15th day of October, 1873, and about that time was being landed at the mills of Havens, in the city of Milwaukee." It also alleges that the coal was to be delivered in Milwaukee at \$4.20 per ton. The breach of the warranty assigned is that the plaintiff put on the dock of the defendants in Milwaukee, about October 15, 1873, only 317 $\frac{1}{2}$ tons "of very inferior and poor coal, not at all equal to the said coal which had been or was being delivered at the mills of said Havens, * * * and not at all equal to the coal contracted to be sold and delivered to him by the plaintiff, and not at all the quantity thereof, and

¹ *West Republic M. Co. v. Jones*, 108 Pa. St. 53; *Scott v. Raymond*, 31 Minn. 487; see note to *Reynolds v. Palmer*, 21 Fed. 439.

not at all equal to the agreed price of \$4.20 per ton, but greatly inferior thereto, and not of the value of to exceed \$2.70 per ton." The answer also denies that the coal was delivered to and accepted by the defendant, and contains certain counter-claims for use of dock and for other damages, all of which are based upon such alleged non-delivery and non-acceptance.

The testimony on behalf of the plaintiff tends to prove that the contract was for a cargo of Straightsville nut coal, to be delivered on board at Sandusky at \$3.10 per ton, the defendant to pay for trimming vessel and for freight to Milwaukee; that freight and trimming amounted to \$1.67 per ton, which was paid by the plaintiff; and that the quantity of coal delivered under the contract was 338 tons.

The testimony on behalf of the defendant tends to prove the allegations of the answer above stated, except the reference to coal at Havens' mills. But it tends to prove that there was a similar reference to coal at Hayden's mill. It appears that there were no mills in Milwaukee known as Havens' mills, but that one Hayden was interested in a mill there known as the "Cream City Mill."

The court refused to submit the question of warranty to the jury, but instructed them to find, first, the quantity of coal delivered under the contract, and second, the contract price therefor, and to determine therefrom the amount due the plaintiff. The jury found the quantity to be 338 tons, and the contract price \$4.77 per ton, and assessed the plaintiff's damages at \$1,726.99, that being the amount of such contract price and interest thereon from the date of the delivery of the coal.

A motion for a new trial was denied, and judgment entered on the verdict. The defendant appealed.

J. J. ORTON, for appellant, on the question of warranty cited *Suit v. Bonnell*, 33 Wis. 181; *Smith v. Justice*, 13 Id. 671; *Rosebrook v. Runals*, 32 Id. 415; 6 Id. 295; 12 Id. 276; 18 Id. 196; 2 Chand. 28.

COTTRILL & CARY, for respondent.

LYON, J.

The undisputed evidence proves that the coal in controversy was delivered to and accepted by the defendant.

Hence the counter-claims for damages, all of which are predicated upon the theory that the coal was not so delivered and accepted, must necessarily fail, and it was not error to exclude them from the consideration of the jury.

Three issues of fact were made by the answer. These relate: 1. To the quantity of coal delivered. 2. To the contract price therefor; and 3, to the alleged warranty and breach thereof. All of these matters are pleaded as defenses to the action in whole or in part. The issues of quantity and contract price were fairly submitted to, and were determined by the jury. But the other issue was not so submitted, and has not been determined. The testimony tends to show that the plaintiff warranted his coal to be of good quality, and that the coal which he delivered to the defendant was of very poor quality. True, the answer alleges that this warranty was accompanied with the representation or statement that the coal was as good as that being delivered at Havens' mills, and it appears that there were no Havens' mills in Milwaukee, to which the representation could be referred, and hence that the quality of the coal delivered to the defendant could not be tested by comparing it with the coal at those mills. Yet, we think those facts do not destroy the warranty, but that it is, nevertheless, a warranty of good quality, a breach of which will operate to reduce the damages which the plaintiff would otherwise be entitled to recover. For illustration, suppose a person who is negotiating the sale of a horse, says: "I warrant this horse to be perfectly sound. I warrant him to be as sound as any horse owned by C D;" and one purchases, relying upon the warranty. It turns out that C D has no horse. Can it be doubted that this is a warranty of soundness, for the breach of which the purchaser may recover damages?

We think that it should have been submitted to the jury to find whether there was a warranty, and, if so, whether there had been a breach thereof. Finding a warranty and breach, the jury should have been directed to assess the damages resulting therefrom, and to deduct the same from the contract price of the coal, assessing the plaintiff's damages at the sum remaining after making such deduction, and the interest on such sum. Because such issue was not submitted to the jury there must be a new trial.

At the last term a motion was submitted on behalf of the respondent to strike out the printed abstract of the return of the clerk theretofore served, for alleged non-compliance with rules 8 and 22 of this court; and numerous alleged errors and defects in such abstracts were pointed out. The decision of the motion was postponed until the cause should be argued. In *Lloyd v. Frank*, 30 Wis. 158, we held that we would not entertain a motion by the respondent to dismiss an appeal for non-compliance with those rules; but that in such cases the court will exercise its discretion, and make such order as may be proper, of its own motion. We think the same rule should be applied here. The motion will, therefore, be dismissed, but without costs.

It should be added that although some part of the return is quite imperfectly abstracted, yet we see no evidence of bad faith in the preparation of the abstract, and those portions of the record which we have found it necessary to examine for the purpose of determining the appeal, seem to be sufficiently set out in the printed case.

BY THE COURT—Judgment reversed and a new trial ordered.

RYAN, C. J., took no part in the decision of this cause.

McGRAW ET AL. V. FLETCHER.

(35 Michigan, 104. Supreme Court, 1876.)

Express warranty. Where there is an express warranty, there is no room for implications.

"Complete in everything for working." A provision in a contract that a drilling machine shall be "complete in everything for working."

Held: no warranty of what the machine could do, but only an agreement that it should be delivered fully equipped.

Drilling machine bought for prospecting purposes. Fletcher, the plaintiff, sold a patent diamond drill to defendant's intestate. Plaintiff knew that he intended to prospect for minerals with it, and stated that the machine had been used for that purpose, but both parties knew that the machine had not been constructed for this species of work and that its merits in that regard had not really been tested; the machine was to be delivered "complete in everything for working." *Held:* that there was no warranty, express or implied, that the machine was adapted to the use of prospecting.

Error to the Wayne Circuit.

This action was brought by defendant in error against Ebor B. Ward in his lifetime, and was being tried before the referee at the time of Mr. Ward's sudden death. The suit was revived against plaintiffs in error, who were appointed special administrators, pending the contest over the will of the deceased. After the revivor, the trial proceeded before the referee.

T. C. OWEN and MOORE & MOORE, for plaintiffs in error.

GEORGE E. WASEY and D. C. HOLBROOK, for defendant in error.

GRAVES, J.

Fletcher brought this action to recover the unpaid balance arising on a written contract for the sale by him of a patent diamond drill to decedent Ward. The cause was referred and the referee reported the facts and found the plaintiff below was entitled to recover three thousand nine hundred and twenty-nine dollars and eighty-three cents. Plaintiff in error excepted to the report, but the court overruled the exceptions and entered judgment as recommended by the referee.

Two objections are made: first, in ruling that on the facts as found, there was no express warranty that the machine would do the work for which it was purchased; and second, in deciding that there was no implied warranty to that effect. The referee finds that Fletcher knew Ward purchased with the design, and for the purpose, of using the machine in prospecting for minerals in Missouri and elsewhere, and that it proved practically worthless in that business. If there was an express warranty there was no chance for implication. Was there any express warranty that the machine would work with any efficiency in prospecting? We think not. Plaintiffs in error rely on a passage in the contract that the machine was "to be complete in everything for working." But this occurs as a term in the stipulation for the delivery of the machine by Fletcher at the depot in Chicago for shipment to such place

as Ward should direct. It had no reference whatever to the ability of the scheme of the machine to work well in prospecting, or at all. It was an agreement that the machine, such as it was in principle and range of usefulness, should be delivered, prepared and equipped, to do what, in principle, it was capable of doing.

Was there any implied warranty? Plaintiffs in error claim there was, on the ground that Fletcher knew Ward was buying the machine for use in prospecting; that the former was to send an expert to Missouri to set it up and set it running and informed Ward that it was good for boring in rock and had been used for prospecting in many places, and that the most he had known it to cut in one day was fifty feet.

Whether a warranty of utility in the working of a machine in some special service not strictly within the sphere of action for which it was contrived can be implied, must depend upon the particular facts, and it seems reasonable to conclude they ought to be very strong to warrant the inference or an agreement by the seller that a machine contrived for work of a given kind, and within a given a range, will operate well in practice in work of a different character, or in work required to be carried on under conditions not agreeable to its plan or in harmony with its arrangements for being worked and kept in action.

Ward bought with the avowed object of using the machine as a practical convenience in exploring for minerals. Fletcher knew this; still both understood that the machine had not been contrived for this description of work, and that its ability to be really useful in that way had not been ascertained.

However sanguine either may have been, that it could be used successfully in the way Ward wished to use it, the fact was yet to be decided by experiment. Fletcher desired to sell and Ward desired to make the experiment. The parties endeavored to test the expertness and power of one of the machines, and when Fletcher observed that fifty feet was the most he had known it to cut in one day, he was particular to add that he would not guaranty any amount whatever, and Ward does not seem to have thought it expedient to insist upon any warranty. He appears to have been content, after inspecting the operation of one shown him, to take a risk in reliance on his own eyes and judgment. The facts not on'y

fail to favor an implication of warranty, but, on the contrary, they invite belief that it was tacitly understood, that the machine should be taken at Ward's risk as to its ability to be used successfully in prospecting. There was hence no ground for implying a warranty that the machine was adapted to the use Ward wished to make of it.

The referee committed no error, and the judgment must be affirmed, with costs.

The other justices concurred.

JOHNSTON'S ADM'R V. MENDENHALL.

(9 West Virginia, 112. Supreme Court of Appeals, 1876.)

Sale of "all interest" of vendor—No implied warranty. Articles under seal were entered into, intending that the vendor agreed to sell all his right, title and interest, in a certain oil lease, in consideration whereof the purchaser agreed to pay \$1,000. Vendor further agreed to sell "all his interest," in another lease for which the purchaser agreed to pay \$1,500. The vendor had no formal lease upon either premises, but was in possession under agreements. The purchaser knew the state of the title: *Held*, 1st, that the subject-matter being chattel property, the articles of agreement between the parties amounted to a conveyance of the premises; 2d, that vendee having accepted such conveyance, limited in terms to the interest of the vendor, and containing no covenants of warranty, the vendor could not be held responsible for not having a greater interest in the property and no warranty of title could be implied.

Where a sale is limited in terms to such interest as the vendor has, without warranty, the transaction being free from fraud or concealment, a defect in the vendor's title can not defeat a suit for purchase money.

Executory agreement treated as executed. An agreement, executory in terms, to transfer chattel property, accompanied, however, by the actual transfer, will be treated as a bill of sale, *i. e.*, as an executed contract.

The rule in regard to warranty on sale of leasehold interests, such as are required to be transferred by deed, is the same as in cases of real estate.

Appeal from, and supersedeas to, a decree of the Circuit Court of Wirt County, rendered on October 17, 1874, in a certain suit in chancery then pending in said court wherein J. C. Hall, sheriff of said county, and, as such, administrator of the estate of William H. Johnston, deceased, was complain-

ant, and Harrison Mendenhall and George Rice, respondents. The appeal reached this court on the petition of said Mendenhall.

The opinion of the court contains a full statement of the case.

B. B. CHAMBERLIN, of Ohio, WALTER S. SANDS and DAVID H. LEONARD, for the appellant.

JOHN A. HUTCHINSON, for the appellee.

MOORE, J.

On the fifth day of May, 1864, Johnston, as party of the first part, and Mendenhall, as party of the second part, entered into an article of agreement, under their respective hands and seals, which witnesseth: "that the party of the first part, for and in consideration of the sum of one dollar in hand paid by the party of the second part, and the further consideration hereinafter mentioned, agrees to sell all his right, title and interest to the party of the second part, of, in and to a certain oil lease on the tract of land owned by one S. H. Klinck, situated in Ritchie county, State of West Virginia, which said lease is bounded by the Parkersburg railroad on the one side, by Goose Creek and a line drawn from said creek to said railroad, on which there is an oil well, a steam engine, tubing, etc., including all the tools and other property on said lease, owned by said party of the first part; for, and in consideration of which, said party of the second part, agrees and binds himself to pay the sum of one thousand dollars; and also the party of the first part agree to sell to the party of the second part, all his interest of, in and to, a certain lease obtained from J. Ashworth on one hundred acres of land, for oil purposes; the one eighth of the oil to go to the proprietor, and to continue about seventeen years from this date, more or less. In consideration of which said party of the second part agrees and binds himself to pay, on or before the 10th day of next month (June), the sum of one thousand and five hundred dollars lawful money."

This agreement forms the basis of the suit, in the nature of a foreign attachment suit in chancery, in the Circuit Court of Wirt County, instituted by Johnston against Mendenhall.

The original bill, after alleging plaintiff's ownership of the two leases, etc., and the entering into said written agreement, and making an exhibit of the same as a part of the bill, and plaintiff's readiness and willingness to execute the same on his part, and to execute, acknowledge and deliver to Mendenhall such further conveyances or assurances of the said leases, as by the contract he was bound to do, on payment of the said sums agreed by the said Mendenhall to be paid to the plaintiff, and Mendenhall's neglect and failure to pay the same under the contract, and that the whole amount remains due, unpaid and in arrears; alleges, that Mendenhall is a non-resident of the State of West Virginia, but owns real estate in the county of Wirth, etc., prays that Mendenhall be made defendant; that plaintiff may have a decree for the payment of his debt, and that the said property of Mendenhall be attached and sold to satisfy the same, and the usual prayer for general relief.

Mendenhall demurred to the bill, as showing no case for equitable relief; and further that by ancient rule of the court no person shall exhibit a bill "for specific performance of a contract for the sale of a tract of land, or term of years therein, against his or their vendee, unless they show good title and exhibit the same in his or their bill," and that no suit can be maintained on a contract barred by the statute of limitations.

The court sustained the demurrer and gave leave to amend the bill. At the July rules, 1871, the amended bill was filed, which alleges the filing of the original bill, and refers to and makes said bill part of the amended bill for all purposes not inconsistent therewith; it further alleges and charges that defendant at the time of the purchases was fully acquainted with every thing relating to the title which the plaintiff had and held to said several leases, interests and property, and that, according to the very terms of the agreement, he only purchased all the right, title and interest of the said plaintiff in said property; that Mendenhall had examined and knew full well at the time of his purchase that the said plaintiff's interest in said Ritchie county lease of lands was evidenced by an agreement in the form of a letter from Seth H. Klinek containing the terms upon which a lease in form would be granted; which terms had been complied with by the said plaintiff, and

he was put in, and was in possession of said property in Ritchie county, oil well, steam engine, etc., at the time he sold the same so Mendenhall; that plaintiff had prior to said sale paid for his right, title and interest in said property \$1,200 cash, and that when Mendenhall entered into said agreement of sale the plaintiff simply transferred to him his equitable right, title and interest in the said leasehold property, and the plaintiff's legal right to said steam engine, etc.; that plaintiff, upon the signing of the contract by Mendenhall, gave him the letter from Klinck, which Mendenhall accepted, and doubtless still has the same in his possession, having received the same, knowing it to be the evidence of the plaintiff's interest, right and title to said Klinck lease and oil well; that Mendenhall, after making said agreement, organized an oil company to which he transferred the Ritchie county oil well and steam engine, etc., for a valuable consideration; and that Klinck, according to the terms of said letter, and for other considerations, made said Mendenhall or his assignees, a lease formally drawn for a larger scope of land, including the lot and well sold by plaintiff to said Mendenhall, and that Mendenhall, knowing the state of the said plaintiff's title and interest in said Klinck land and oil well, and, being perfectly satisfied therewith, was content, without any fraud or false representation of the plaintiffs, to enter into said contract, and to take said equitable leasehold interest on the Klinck land without requiring the plaintiff to warrant, or in any other manner to assume the title, right or interest which the plaintiff had therein; and that Mendenhall, having received and sold said property, steam engine, etc., and got his money therefor, it is too late for him to allege anything against the right, title and interest which, without warranty, he obtained from the plaintiff; that as to the Ashworth lease of land Mendenhall was fully acquainted with it, its nature, terms and the title of the lessor to the land in fee, and received the same from the plaintiff by assignment of all the interest which the plaintiff had therein; and that Mendenhall afterward sold or assigned it to the oil company, and that Mendenhall, or the company, realized the value thereof, etc.

Mendenhall demurred, pleaded and answered to the bill.

The demurrer was overruled.

In the answer, he admits having executed the article of agreement, but denied that it was under his seal, and admits that it was made for the purpose alleged in plaintiff's bill; and admits that he took said leases, but sets up new matter as to the purposes and terms for which he took them, but which he does not sustain by proof. He also admits he received the steam engine, though he says "that the possession of said engine was not obtained from said complainant, but from and through said Klinck." His denial as to the Klinck letter is evasive, and not responsive to plaintiff's allegation; but as that allegation was not material to plaintiff's right to recover, the answer is immaterial on that point. He also denies that he sold the leases to any company, "or ever entered into possession of said leasehold estates, or either of them, under said agreement, or ever received any money or other consideration for said leasehold estates, or either of them, for the reason that the plaintiff had no title thereto at the time of making the agreement;" and "denies all and every statement made in said amended and original bills" not specially admitted in his answer.

The plaintiff having departed this life, the suit was revived in the name of J. C. Hall, sheriff of Wirt county and, as such, administrator of the estate of Johnston.

The case, as presented by the record, is not regular, but awkward all through, nevertheless sufficient appears to develop the only point in the suit, and that is the interpretation of the written contract, to ascertain what the plaintiff sold, what the defendant intended to buy, and whether the sale was with or without an implied warranty?

The article of agreement made and signed by both parties under seal, shows that all the plaintiff intended to do was to sell to, and let the defendant have, all the plaintiff's right, title and interest in and to the oil lease on the tract of land owned by S. H. Klinck, situated in Ritchie county, State of West Virginia, bounded as designated in the agreement, on which there is an oil well, a steam engine, tubing, etc., including all the tools and other property on said lease, owned by the plaintiff, in consideration of which the defendant agreed to pay the plaintiff \$1,000; and the plaintiff further agreed to sell the defendant all his interest of, in and to a certain lease

obtained from J. Ashworth, on one hundred acres of land for oil purposes—the one eighth of the oil to go to the proprietor, and to continue about seventeen years, from May 5, 1864, in consideration of which the defendant agreed and bound himself to pay, on or before the tenth day of June, 1864, \$1,500.

The view advanced by appellee accords with my own; that the subject-matter being chattels, and not capable of being readily transferred by manual exertion, the interest sold and assigned, was actually delivered and passed to the vendee, or assignee, by the agreement, which was the bill of sale and deed; and that especially in this case, as no time was fixed in the writing when the purchaser was to take the right, title and interest sold him, it must be deemed an immediate transfer thereof, without warranty, as the plaintiff did not agree to make any other deed or assurance, and, in fact, that the written contract is a sufficient deed to convey all the interest sold.

The purchaser admits he was in actual possession of the property; he does not show a paramount title, or even defect in the accepted title; nor does he claim to have been evicted from the possession; but for years he has rested quietly, having reaped the benefit of his purchase, and withheld payment of the purchase money. I do not think he comes with grace in an attempted defense against a suit for the purchase money. In my view, so far as the plaintiff is concerned, the contract on his part, was fully executed without further assurance or other deed; and that, as to the defendant, it was executory, and when he failed to pay the money in the time agreed by him, the plaintiff had a right to institute suit against him as a non-resident, by way of a foreign attachment in chancery, and that it is too late for him to set up an implied warranty.

The vendee having, with his eyes open, entered into the written agreement, without demanding and having an express warranty therein, it seems to me, that having omitted it in an instrument deemed by him of such solemnity as to require the seals of the contracting parties, it was clearly the intention and understanding of the parties, that there should be no warranty.

But since the statute treats the conveyances of leases in lands for a term of more than five years with the same dignity as freehold estate, by requiring them to be by deed or will,

it seems to me the rule in regard to warranty in the sale or conveyance of a leasehold for a term of years, should be the same as that governing the sale of real estate. Judge Carr, in delivering the opinion in *Com. v. McClanahan*, 4 Rand. 482, said, "In every transaction of purchase and sale, it is the contract of the parties, and no tribunal can change, alter or modify it in any manner. To do so, would be to make contracts for men. When a man buys land, he has, or may and ought to have, all the deeds, the whole chain of title before him. This title it is his duty to look into, and to take such covenants and warranty in his deed, as will protect him; and where there is no fraud or concealment he can only look to the covenants and warranty, in case of eviction, and will have no claim, either at law or in equity, farther than they give it to him. If he has bought with covenants against the acts of the vendor and his heirs only, and he is evicted by title paramount, he has no claim against the vendor. If he has bought without any covenant at all, he has no claim against anybody. It is his folly to have made such a contract, and the law will not give him an action, who has not provided one for himself. The books teem with cases in support of these positions." Citing a number of authorities, he says, "many more cases might be cited; but, perhaps, too much has already been said on a subject so long and so well settled." From that case, I understand the rule to be that, "the vendor of real estate is not responsible for any defects of title, unless he has bound himself by some covenant or warranty to protect the vendee, or unless he has been guilty of some fraud or concealment." If, therefore, I am right in the view, that a leasehold for a term of more than five years should follow the same rule, then the defendant in this case is bound by his contract, and there being no express warranty therein, he is not entitled to ask the court to make a contract for him, against the plain intention of his agreement. He can not set up an implied warranty by extrinsic evidence or legal presumption. He bought the right, title and interest, and *caveat emptor* applies. In the language of Judge Carr, in the case cited, "He probably weighed the chances, and was willing to incur the risk, for the prospect of the gain. The hazard was a fair one, and if the result has disappointed his hopes, he has no right to complain."

The defendant does not offer to surrender the property he received, nor the interests assigned him; and having failed to prove the matters affirmed by him in his defense, I think this court should not interfere with the decree complained of, but should affirm it with costs and \$30 damages.

The other judges concurred. Decree affirmed.

1. Delivery of bad iron on a general contract: *Held*, a compliance, vendor believing the quality good at the time: *Kirk v. Nies*, 2 Watts, 367.

2. Contract to furnish a monument of "good white marble" construed: *Viall v. Hubbard*, 37 Vt. 114.

3. Losses incurred by the manufacture of oil drills from defective steel can not be recovered upon a warranty that the steel is first class, if the vendee persists in manufacturing the drills to his own loss after discovering the imperfect quality of the steel: *Draper v. Sweet*, 66 Barb. 145.

4. Implied warranty that article bought for specific purpose (mining pump) shall be suitable for that purpose: *Getty v. Rountree*, 2 Pinney 379.

5. No implied warranty of quality of coal sold: *Warren v. Philadelphia Co.*, 83 Pa. St. 437.

6. Warranty of steel; selling inferior article on second order, after a proper article on first order: *Bagley v. Cleveland Co.*, 21 Fed. 159.

7. Implied warranty of copper sold for sheathing: *Jones v. Bright*, 5 Bing. 538; *Gray v. Cox*, 4 B. & C. 108.

8. Statement of quality does not necessarily imply a warranty of that quality: *Carondelet Iron Works v. Moore*, 2 M. R. 625.

9. Facts amounting to warranty of iron; recoupment after the use of the article: *Dayton v. Hooglund*, 39 Oh. St. 671.

10. When warranty may be implied: *Harlan v. Lehigh Co.*, 8 M. R. 496.

11. Warranty of iron to be free from sulphur: *Kaufman v. Cooper Co.*, 105 Pa. St. 537.

12. Contract to furnish oil from certain wells to certain pipe-line does not run with the land: *West Va. Tr. Co. v. Ohio River Pipe Line*, 22 W. Va. 600.

SAUNDERS' CASE.

(3 Coke, 12, Common Pleas. Time of Elizabeth.)

Open and unopened mines. If a lease of land be made for life, or for years, in part of which there is a mine open, the lessee may dig it. If the mine was not open at the time of the lease made, the lessee can not open it.

Mines mentioned. If a man hath mines hid within his land, and leases his land and all mines therein, the lessee may dig for them.

Void exception. If land be leased in which there is a hidden mine, and the lessee opens it and then assigns his term with an exception of the profits of the mines, or the mines themselves, or of the timber, trees, etc., such exception is void.

Waste against executors. If lessee devise his term and die, and then his executors do waste, and afterward assent to the devise, an action of waste in the *tenuit* lies against the executors.

Saunders brought an action of waste against Marwood, assignee of the term in the tenement, for waste done in digging sea coals; the defendant pleaded in bar that the first lessee, who opened the mine, granted to him all his interest in the land *cum omnibus profit' (except' & semper reservatus sibi & haered' suis tot' benefic' & profit' miner' Anglice* the coal mine, *in praed' parcell' terr' ac omnibus arboribus maeremii;*) and averred that the said mine was, at the time of the assignment, and yet is, open. Whereupon the plaintiff demurred in law. And on great deliberation it was adjudged for the plaintiff; and in this case three points were resolved:

1. If a man hath land in part of which there is a coal mine open, and he leases the land to one for life, or for years, the lessee may (Co. Lit. 54 b) dig in it; for inasmuch as the mine is open at the time, etc., and he leases all the land, it shall be intended that his intent is as general as his lease is: *scil.*, that he shall take the profit of all the land and, by consequence, of the mine in it. *Vide* Fitz. Waste, 101, 17 E. 3, 7 a. b., John Hull's case acc'; and so the doubt in F. N. B. 149 C. well explained.

2. If the mine were not (1 Sider. 152; 2 Roll. 816; Latch. 190; Co. Lit. 54 b.; Hob. 234) open, but included within the bowels of the earth at the time of the lease made, in such case, by leasing of the land, the lessee can not make new

¹ *Griffin v. Fellows*, 8 M. R. 668.

mines, for that shall be waste: F. N. B. 59 and 22 H. 6; 18, b. acc'.

3. If a man hath mines hid within his land, and leases his land, and (F. N. B. 149 c; Co. Lit. 53 b, note (1) 54 b) all mines therein, there the lessee may dig for them, for (Co. Lit. 56 a, 153 a; Hawk. Max. 258,) *quando aliquis aliquid concedit, concedere videtur & id sine quo res ipsa esse non potest*, and therewith agrees 9 E. 4, 8, where it is said that if a man leases his land to another, and in the same there is a mine (which is to be intended of a hidden mine), he can not dig for it; but if he lease his land and all mines in it, then, although the mine be hidden, the lessee may dig for them, and, by consequence, the digging of the mine in the principal case was waste in the first lessee.

4. It was resolved, that although the mine was first opened by the first lessee, yet, if his grantee dig in it, it is waste in him.

5. It was resolved, that the exception was (Allein, 81, 82; 13 Co. 60; Cr. Jac. 296; Poph. 195; Com. Dig. Fait. E. 7; Touch. 78) void; for, first, by the exception of the profits of the mine, or of the mine itself, the land is not excepted; and then it follows, that he hath excepted that which he could not have or take: as if a man assigns his term, and excepts the timber trees on the land, or the gravel or clay within the land, it is void, for he can not except to himself a thing which doth not belong to him by the law. And although it was said that forasmuch as the lessee first opened the mine, and thereby committed waste, and so had *quodam modo* appropriated it to himself, and by his wrong has subjected himself to lose the place wasted, and treble damages, it should be a reason that he might keep it to himself, and so continue punishable for the waste of which he was the first author; but notwithstanding that, it was resolved as above; for his wrong which he committeth can not divest the interest in the mine, being in the land demised to him out of the lessor; and, therefore, he can not except that to himself which belongs to another; and it was adjudged, Pasch. 28 Eliz. in the Common Pleas, Rot. 820, between Foster and Miles, plaintiffs (1 Leon. 48; Cr. El. 17, 683; 13 Co. 60, 61; Co. Ent. 695, pl. 3; 2 Bulstr. 6), and Spencer and Bode, defendants, that where the lessee for years

assigns over his term except the timber trees, and afterward the trees were felled, that the action of waste was maintainable against the assignee, for the (1 Leon 49; Cr. El. 17, 683; Poph. 194) exception was utterly void for the causes aforesaid, *quod nota bene*.

And in this case it was said, if lessee for years devises his term to another, and makes his executors, and dies, the executors do waste, and afterward assent to the devise, in that case, although between the executors and the devisee it hath relation, and the devisee is in by the devisor, yet an action of (Com. Dig. Wast. C. 4; 1 Roll. Rep. 248; 2 Inst. 302; Swinb. 324; Bridgm. 54; Co. Lit. 54) waste shall be maintainable against the executors in the *tenuit*. So, if grantee of a term on condition doth waste, and afterward the grantor enters for the condition broken, the action of waste shall be maintainable against the grantee in the *tenuit*: Fitz. Waste, a. 6; 30 E. 3. 16. a. b. acc'.

GIBSON V. SMITH.

(2 Atkyns, 182. High Court of Chancery, 1741.)

Threats to commit waste—Injunction. The court of chancery has jurisdiction to stay waste in opening mines where the defendant has threatened to open them and insists upon his right so to do.

It is not necessary to stay till waste is actually committed, where the intention appears and the person insists on his right to do it.

The plaintiff being a trustee of the late Duke of Wharton's estate, for the benefit of creditors, and having sold a part to the defendant, with a particular exception and reservation of the waste of the manor, and all mines in the said wastes, by virtue of a proviso in the deeds of conveyance, has brought this bill to prevent the defendant from committing waste by opening mines, etc.

It was objected, that the bill is not properly brought, as this is not a matter for the determination of a court of equity, that it is a mere legal right and a legal estate, and consequently there was no occasion to come into this court.

Lord Chancellor, HARDWICKE.

The plaintiff may certainly come into this court to restrain the defendant from opening the mines, etc., even if he has only threatened to do it; nor is it necessary the plaintiff should have waited till the waste is actually committed, where the intention appears, and the defendant even by his answer insists on his right to do it; there are a great many cases, where such bills have been allowed; and indeed, if the defendant, by his answer, had disclaimed any right, there would have been no grounds for such a suit.

If a bill is brought by an owner of a reversion against a tenant for life, and no proof appears of any waste, yet if tenant for life insists upon his right, and it is proved that he has none, this court will grant an injunction.

As to the merits of the cause, the first point is with respect to the grounds, that are called the common of pasture, which the defendant insists are confined to a cow pasture only.

But the plaintiff charges by his bill, that they are the waste of the manor, and that there is an exception of all mines which are in the waste.

The defendant, on the other hand, says, that this is not properly waste, but enjoyed by the customary tenants, and is part of the soil belonging to the these tenants; and if he had made out this fact, there could have been no pretense for the claim the plaintiff sets up by virtue of the reservation.

But I am of opinion that they are to be considered as part of the waste of the manor, and the common of it; for by the evidence it is plain that the common of pasture lies intermixed with the other commons which are enjoyed with the rest of the manor; from the middle of September to the middle of April the gates of these grounds, which were stinted for four months, are thrown open and laid to the other common, and are enjoyed by all the inhabitants.

In several manors there are some part of the tenants only which have a right of commoning, and yet it does not follow but it may be waste and belong to the lord as much as if it was a general common.

This sort of tenure, called tenant-right estate, is now well settled (*vide* 1 Bro. Ch. Rep. 198), and is in no disfavor of the

court, though it was otherwise at the time of the decree in the reign of Jac. I., when Philip Lord Wharton, lord of this manor, was plaintiff, and some of the customary tenants defendants.

The being stinted does not at all prove that they are not waste but only for the benefit of the tenants, and are not for this reason less the waste of the lord than before.

It would be very hard upon a bill *quia timet*, where there is not the least syllable of proof that the defendant has opened any mines, to grant an injunction on a suspicion or a threatening to do it, where the defendant insists not upon his right.

The next point is as to the free rents, and I am clear of opinion that they pass by the general word rents, and would even have passed under the word manor, if they had not in the drawing of these conveyances been so explicit, and therefore there is no ground for the defendant to reconvey as to the free rents; and as to this part, the plaintiff's bill ought to be dismissed.

CROUCH V. PURYEAR ET AL.

(1 Randolph, 258. Court of Appeals of Virginia, 1822.)

Tenant in dower working underlying seams. It is not waste in a tenant in dower of coal lands to take coal, to any extent, from a mine already opened, or to sink new shafts into the same veins of coal. The tenant may penetrate through a seam already opened and dig into a new seam that lies under the first.

¹ **Veins and mines.** The extent of the meaning of the word "mines," and its identity with "veins," discussed by counsel, with collation of the authorities.

John G. Crouch filed a bill of injunction in the Richmond Chancery Court, against Puryear and his wife, McRae and Dorrington, praying that they may be enjoined from working any new coal-pit opened since the death of John Ellis, and from removing the coal that has been raised from the said new pit.

The case stated by the bill is this:

¹ *Astry v. Ballard*, 8 M. R. 316.

John Ellis died intestate, leaving a widow and three children. At the time of his death, he was seized of about two hundred and thirty-four acres of land in Henrico county. Upon the assignment of the widow's dower, the portion of land which was allotted to her, contained a mine of coal which had been worked to a small extent in the lifetime of her husband. The widow afterward intermarried with Puryear, the defendant. Puryear, or some person claiming under him, caused another pit to be opened on the dower land, and proceeded to raise coal therefrom; but a suit being threatened, he desisted. The plaintiff, Crouch, afterward purchased the rights of the children, and thus became entitled to the whole of the said tract, subject to the dower aforesaid. McRae and Dorrington, having purchased a lease of the said dower land, are preparing to resume the working of the said new pits, and to open one or more other pits or other seam or seams of coal, and to work them on a very large scale. The plaintiff, therefore, prays an injunction to stop the defendants in their proceedings aforesaid; more especially as he does not consider them able to make compensation, if the mischief shall be once perpetrated.

The chancellor awarded the injunction.

McRae and Dorrington filed their joint answer, admitting the lease to them, and their intention to go on and take coal from the mine opened by the said John Ellis, and for that purpose they mean to sink shafts and do such other things as are required for the full enjoyment of their rights under the lease, without committing waste. That they, as representing the rights of the widow, are authorized to take coal from the said mine, without stint, and that it is not waste to sink shafts or pursue the coal belonging to the said mine, in every direction, and to every extent they may think proper to obtain the coal. They admit that there was another shaft sunk at the distance of a very few yards from the pit opened by the said John Ellis, before the lease to them; but by whom it was done, they know not. The defendants are working the said last mentioned shaft, which they conceive they have a right to do; not only because they believe that all the coal upon the said dower lands are part of the same mine, (having no reason to believe that there is any other distinct body of coal

on the dower lands,) and that the shaft on which they are working passes through the seam or vein which was opened by the said John Ellis in his lifetime; but because, upon the principles of law and common sense, a mine once opened, is regarded everywhere. This doctrine is the more reasonable, as the lands where a mine is situate, are usually sterile and of no value, except for the mineral; and, therefore, to deny the free use of it, would be to deprive the doweress of all benefit from the endowment.

Ellis Puryear and his wife also filed their answer, which contains, in substance, nearly the same matter as the answer of McRae and Dorrington.

Upon motion of the defendants, the chancellor dissolved the injunction, being of opinion, that the two seams or strata of coal are proved to be connected by a substance of slate and coal throughout, and should be regarded as forming the same line, according to the understanding of the colliers in England and Scotland, in like cases; and if so, the tenant for life, in right of her dower, might, upon common law principles, work the old shaft to every reasonable purpose, without stint; and upon the same principles she might open new pits or shafts for that purpose.

The plaintiff, Crouch, obtained an appeal from this order of dissolution.

STANARD, for the appellant.

Upon the supposition that the appellees are working a new vein (which is the fact), the law is clear in favor of the appellant. The cases which may be relied upon on the other side will be found, on examination, not to support the right claimed by the appellees. The case of *Findlay v. Smith*, 6 Mumf. 134, was governed by the value of the property, and the terms on which it was devised; the relationship of the devisees to the testator; the heavy charge he had imposed on the life estate, and the intention to be inferred from these considerations. As to *Clavering v. Clavering*, 2 P. W. 388, it may be remarked that it goes further than any other case in the English books, and that it was not a decision of the right, but a refusal to grant a peremptory injunction, when the plaintiff had a remedy which he might resort to without hazarding the great and irremedi-

able loss that might result from the injunction. But that case is distinguishable from the present in one important point. The mine itself was the subject leased, and not as a mere incident to the tenancy of the land. But all that the tenant claimed in that case was a right to sink new shafts into the old vein. Mine and vein are synonymous. But here the new vein is separated from the old one by a horizontal stratum of slate, which renders them totally distinct. The appellees can not reach this new vein without penetrating through the old one and the stratum of slate that lies between them. *Stoughton v. Lee*, 1 Taunt. 402, proves that the term mine applies to the stratum of coal which has been opened.

CALL, WICKHAM & NICHOLAS, for the appellees.

The case of *Clavering v. Clavering* is a decision in point, and *Findlay v. Smith* follows up the principle and confirms it. It is decided in those cases that a tenant may dig new pits into a mine that is already opened. The question, therefore, really turns upon the meaning of the term mine.

To ascertain its meaning we should resort, not to legal precedents, but to the opinions of men skilled in the particular art or science in question. Every art has its own peculiar language, and it is impossible to speak with the necessary precision if we employ words of science in their vulgar acceptance. Assuming this standard, we shall find that the term mine includes the whole mass or vein of coal, contained within the land held by the tenant. A vein is not synonymous with a seam of coal. A vein or mine (which is the same thing) contains many seams. These seams ~~are~~ separated from each other by strata of slate or other matter, but they are all included in the same mine. Every mine or vein lies in different seams. These ideas are fully confirmed by all the treatises that have been written on the subject: Kirwan's *Geological Essays*, 291; *Ib.* 296; *Ib.* 203; *Ib.* 308; *Homes on Coal Mines* 14; *Encyclop. (Dobson's Edition) Vol. 5, Art. Coal*. In *Clavering v. Clavering* the word vein or mine is used in the same sense. When, therefore, that case decides that new shafts may be sunk in an open mine or vein, it says, in effect, that the tenant may bore into every different seam composing that mine. It makes no difference whether the seams are

separated by a horizontal or perpendicular stratum of slate. They are equally parts of the same vein.

It is not admitted that the free use of a coal mine will produce any injury to the reversioner. On the contrary the sinking of shafts is a benefit to him, because it relieved him from the expense incident to exploring for coal. There is no instance of a coal mine being exhausted.

W. HAY, JR., in reply.

There can be no doubt that upon the authority of *Clavering v. Clavering* the widow is to be restricted to the old vein, and can not open a new one; and the controversy turns upon the import of that term. It is used by the court as a term embracing only a part of the same mine and as restrictive of the rights of the tenant, and in this view can not have any other signification than seam or stratum. The case of *Stoughton v. Lee* is a direct authority for this position. In fact it goes further: It shows that mine and stratum are in legal intendment synonymous. Mine or stratum is the language of the court in the case sent to be determined at law, and the same terms are used by the law court in its certificate, which determined that in the open strata the widow was endowable, but not in those which were unopened; and there were several of each kind upon the same land.

This construction receives additional support from the same case, which decides, as stated above, that where an open mine is assigned for dower, an estimate must be made of its annual profits. It is not easy to conceive in what manner this estimate is to be made of the profits of strata, the existence of which is not ascertained, and which may be indefinite both in number and extent. No mode can be pursued but to consider the visible stratum as the mine, the profits of which are to be ascertained.

The appellees can derive no support from the writers on geology and mineralogy who have been cited. Let their authority be conceded; let the accounts which they give of the structure of mines be correct. Let it be admitted that the term "vein" is technically never applied to minerals, but only to metals; and that the term "mine," when understood scientifically, embraces an indefinite number of strata. What is

there bearing on this case? The point for the decision of the court is not the technical, but the legal import of the terms, in the adjudged cases. This, only, can be brought to bear upon the question. If the term "vein" is used by the court as synonymous with "seam" or "stratum," the word must be received in the sense in which they used it, although it may not be correct in technical language.

But the authority of these writers is not admitted. A court may with propriety receive information upon questions connected with science and trade from persons conversant with them, but it must be derived from their testimony, and not from their writings. Such was the mode adopted in *Clavering v. Clavering*. Works of this nature are not like general histories, to which it is conceded that courts may sometimes have recourse. But this is only as to matters relating to the country at large, and never upon questions of private right, or as to particular customs. Camden's *Britannia*, a work of great authority, was rejected upon a question somewhat like this: Phillips' *Law of Evidence*, 320.

As little support can the appellees receive from domestic precedents. The case of *Lindlay v. Smith*, which was cited as running upon all fours, is surely very unlike the present. The majority of the court who decided it expressly found the decision, not upon common law principles, but upon the rights conferred on the widow by the will, which laid her under no restriction. In addition to which it was admitted that the saline mineral was inexhaustible; and there being no restriction upon the use of that, the right to use the fuel was co-extensive.

The case of tenants in common, who are owners of the inheritance in coal mines, has as little application. The subject is, from its nature, incapable of partition; and if one tenant, through folly or obstinacy, will not contribute to the expense of the works, the other, who is willing to encounter it, should be permitted to derive a profit from them.

As to the argument derived from the absence of British decisions (from which it is inferred that the right claimed by the appellees was never disputed), it may, upon the same ground, and with the same propriety, be urged that such a pretension as theirs was never before advanced. If the law upon this

subject had been so well settled as not to admit of a dispute, it is a little remarkable that the case of *Stoughton v. Lee* should have been sent from the court of chancery to the court of common pleas, at this late period, to determine not merely the extent of the widow's right to work mines, but whether she had any right at all; and this, too, in a country in which collieries have been in vigorous operation for many centuries.

The case of *Gibson v. Smith*, 2 Atk. 183, is a decisive answer to the statement that a coal mine can not be exhausted, and that the reversioner sustains no injury, but on the contrary derives a benefit from the unlimited working of it. It decides that a mere threat to commit waste in a colliery, is sufficient to warrant the interposition of the court; and this, too, in a case in which it never interferes but upon the ground of irreparable injury. And it must be manifest that whether the mine can be exhausted or not, the more it is worked, the greater must be the labor necessary, and, of course, the expense.

Ledbetter's deposition, to which so much importance has been attached, proves at most only what the colliers in some parts of England, in common parlance, understood by the term mine. But even as to this point it is not explicit, but affords only his opinion. But had it been explicit, it is short of the evidence upon which the case of *Clavering v. Clavering* was decided, and which went to show the usage as to tenants, for life or years, of collieries.

Whatever restrictions the law imposes upon conventional tenants, as to whom the reversioner has a right to impose his terms, are, *a fortiori*, applicable to a tenant in dower who comes to her estate by act of law.

December 19.—Judge Brooks delivered the opinion of the court, that the decree should be affirmed.

IRWIN V. COVODE ET AL.

(24 Pennsylvania State, 162. Supreme Court, 1854.)

Reasonable and necessary use. The statutes of Pennsylvania in relation to *waste* forbid to tenants for life such acts as at common law constitute *waste*, except they be such, as in the judgment of the Common Pleas, and according to the terms of the Act of 1848, are requisite to "*reasonable and necessary use and enjoyment*" of the estate.

¹ **Working open mines.** At common law the working of *open* mines by tenant for life is not waste; and in Pennsylvania, whilst the right of possession is unquestioned, the working of open mines by a tenant for life is not waste.

² **Exhaustive mining allowed.** Though a court, by virtue of its common law powers, might restrain unskilful mining and wanton injury to the inheritance by a tenant for life, yet not such mining as is subject to no other objection than its liability to exhaust the mine.

Account—Estrepement. If our courts, under their chancery powers, may direct an account between tenants for life and those in remainder as to coal mined by the life tenant, yet estrepement is not the remedy for obtaining relief in such a case.

Facts of the case—Land sold to coal company. A tenant for life, claiming under a will, sold to a coal company all her right, title and interest to the coal in the land, without limit as to the quantity of coal to be taken therefrom: *Held*, That estrepement did not lie in favor of those entitled in remainder, to restrain the company from working, largely for sale, a mine which had been worked during the life of the testator for the use of the farm and for sale in the neighborhood.

Construction on cross-remainders—The half blood excluded. The testator after devising to his wife one third of the net proceeds of certain real estate during her natural life, devised to his son and daughter all real estate not otherwise devised; and directed that in case of the death of either of the children before attaining the age of twenty-one years, without lawful issue, the said real estate should go to the survivor. The daughter died *first*, in her minority and without issue, and the son afterward died, also in his minority and without issue: *Held*, That there being cross-remainders in fee, on the death of the sister the brother took her share, not as *her heir* at law, but under the will of the testator; and on the death of the son without issue, the *half* brothers and sisters of the testator could not take from the son, because they were not of the blood of the ancestor, the testator. But the children of a deceased sister of the *whole* blood of the testator took the estate on the death of the son.

Error to the Common Pleas of Westmoreland County.

This was a writ of *estrepement*, issued at the instance of

¹ See *Neel v. Neel*, 1 M. R. 363; *Lynn's App.* 15 M. R. 126.

² *Westmoreland Co.'s App.*, 10 M. R. 394; *Findlay v. Smith*, 13 M. R. 182.

John Irwin and others against John Covode and others, composing the Westmoreland Coal Company, to restrain them from committing waste, by mining for sale large quantities of coal, in a tract of land in which the plaintiffs alleged they owned the remainder in fee, admitting that Martha Hughes, formerly the widow of Humphrey Fullerton, under whom the defendants claimed, had a *life estate* in the land. The proceeding was under the act of 10th April, 1848, in regard to waste, which extended the provisions of the act of 29th March, 1822, to estates and tenants *for life*.

A case was stated, in which the facts, as follows, were agreed upon to be considered on the hearing of a motion to dissolve the writ of estrepement.

1. Humphrey Fullerton acquired the land. He died 29th January, 1835, after having made his last will, dated 31st May, 1834, approved 18th March, 1835, in and by which he devised to his widow Martha, one third of his real estate for life, and all the residue to his two children, William and Hannah, or the survivor of them in fee. They were his only children.

The provision in the will, with respect to the children, was —“And in case of the death of either of my said children, before attaining the age of twenty-one years, without lawful issue, I devise and bequeath all the real and personal estate of which I may die possessed, herein bequeathed to them, to the survivor.”

The case proceeded as follows:

Hannah died intestate, without issue, and in her minority, on the 2d October, 1836, and William also died intestate, without issue, and in his minority, on the 2d October, 1844. Neither were ever married. Martha (the widow) married the Rev. Watson Hughes on 6th September, 1836, and they had, at the death of William Fullerton, two children, Ann Hughes and Harriet W. Hughes, who are yet in full life, as well as their father and mother. Humphrey Fullerton left a sister of the *whole blood*, Mrs. Jane Irwin, who died 23d February, 1836, leaving the *plaintiffs in this proceeding* as her heirs at law. He also left brothers and sisters of the *half blood*, some of whom are yet in full life. The defendants are a coal company, with a capital stock of \$500,000, and claim the right to mine, take and carry away the coal from the tract of land described

in the writ, by virtue of articles of agreement with Rev. W. Hughes and wife. The defendants have constructed a railway over the land, and have opened a drift through the same, and were, at the time of the issuing of this writ, mining and taking and carrying away the coals from the same. This mine had been opened and worked to procure coals for the use of the farm, and for sale in the neighborhood in the lifetimes of Humphrey Fullerton and of his children. But the defendants have opened a new drift into the same mine, near the old one, and are now working both drifts.

By the article of agreement, W. Hughes and wife agreed to sell all their right, title, and interest to the coal in the lands referred to. The sum of \$140 per acre was to be paid for a part of the coal, and \$70 per acre for another part; and the payments were to average \$500 per annum, whether the coal was taken out or not.

The writ of estrepement was dissolved by the court, which was assigned for error.

By the act of 10th April, 1848, it was enacted that the provisions of the act of 1822, to prevent waste in certain cases, are extended so as to embrace and be applicable to *estates and tenants for life*; but it is provided that no tenant or tenants for life shall hereby be restrained from the reasonable and necessary use and enjoyment of the land and premises in his, her or their possession; and that the court of common pleas shall have power to inquire into and determine the nature and extent of said use and enjoyment, upon any motion to dissolve said writ.

FOSTER, for plaintiff in error.

COWAN, with whom was MCKINNEY, for defendants in error.

The opinion of the court was delivered by WOODWARD, J.

The working of open mines by a tenant for life is not waste, either at common law or under our acts of assembly. But under the latter, it is said, such working must be limited to "a reasonable and necessary use and enjoyment." These words first made their appearance in the proviso to the act of 10th April, 1848. That act was supplementary to the act of

29th March, 1822, which gave remedy by estrepement to owners of lands leased for years or at will, to purchasers at sheriffs' sales, and to mortgage and judgment creditors, to prevent "*waste to the freehold*;" but there was no attempt to define what should constitute waste to the freehold. The object of the act of 1843 was to extend these provisions to tenants for life, and to give remaindermen the same remedies that landlords, purchasers and creditors enjoyed, but the proviso was added as a saving clause, "that no tenant or tenants for life shall be hereby restrained from the reasonable and necessary use and enjoyment of the land and premises in his, her or their possession; and that the court of common pleas shall have power to inquire into and determine the nature and extent of said use and enjoyment upon any motion to dissolve said writ." Exactly the same saving clause in behalf of mortgagors was introduced into the act of 22d April, 1850, extending the act of 29th March, 1822, for the protection of mortgagors after judgment recovered.

The substance of this legislation is, that tenants for life and mortgagors shall not commit waste to the freehold, but may have reasonable use of their estates, the extent of which is to be determined by the court of common pleas. As the statutes do not define the legislative idea of "*waste to the freehold*" we must go to the common law for that, and then we understand all such acts to be forbidden by the statutes as at common law constitute waste, except they be such as are necessary, in the judgment of the common pleas, to the reasonable use and enjoyment of the estate. But, at common law, as we have said, the working of *open* mines by a tenant for life was never accounted waste. This was very fully shown in *Neel v. Neel*, 7 Harris, 323. It would seem to follow, then, that neither the restraining nor the enabling clauses of our legislation have any application to open quarries, mines, etc.

It is apparent from the act of 1803, and its supplement of 1833, that the legislature understood the working of open mines and quarries was not waste, for the first of these acts having given plaintiffs in pending ejectments the writ of estrepement to prevent "*waste and destruction*," the act of 1833 defines these words to mean "quarrying and mining and all such other acts as will do lasting injury to the premises;"

but the proviso is, that as to quarries and mines opened before suit brought, the estrepement shall be dissolved on the defendant's giving security to the satisfaction of the court for any damages the plaintiff may sustain. Thus it appears that, even after ejectment brought, open quarries and mines may be wrought, the contingent interests of the plaintiff being guarded by security. But, while the right of possession continues unquestioned in the tenant, there is no limitation or restraint whatever imposed by our acts of assembly on his working of open mines. It may, indeed, be doubted whether the saving clauses adverted to do not *empower* him to open mines and quarries, that he may have reasonable use and enjoyment of the premises, but this we do not decide, for it is not in the case.

The postulate of the plaintiffs is, that Mrs. Hughes, under whom and her second husband the defendants claim, had but a life estate, and that the plaintiffs are entitled to the reversion. Are they entitled to estrepement? The case admits that the mine had been opened and worked to procure coals for the use of the farm and for sale in the neighborhood, in the lifetime of Humphrey Fullerton. He devised to his widow the one third part of the net proceeds of the rents, issues and profits of his real estate during her natural life, and she having married Hughes, they sold to the defendants, a coal company, with a capital stock of half a million, "all their right, title and interest to the coal in or on the lands known as the Fullerton estate." Under this grant the defendants entered, constructed a railway over the land, opened a new drift through the same, and were, at the time of the issuing of this writ, mining and taking and carrying away coals. The reversioners issued estrepement, and the courts on motion dissolved it. This is the error assigned.

The argument of the plaintiff's counsel is founded on the assumption that the act of 1848 limits the defendants to a reasonable use and enjoyment of the estate; then it is said their means and preparations indicate a clear intention and capacity to take *all* the coals from the land during the continuance of the life estate, and that this is unreasonable. We have shown that this argument has no foundation in the statute. The words quoted from the proviso are not restrictive, but ena-

bling and enlarging, a saving out of a disabling statute, so that if they were applicable to open mines, the consequence claimed would not follow; but they were not applicable.

As yet the legislature have prescribed no limitation to the use which a tenant for life may make of open mines. In virtue of their common law powers the court might doubtless restrain unskillful mining and wanton injury to the inheritance, but not such proper mining as is subject to no other objection than its liability to exhaust the mine.

The profits of coal mines depend much on expensive preparations for working them, and in order to compensate this necessary investment, as well as to compete successfully with rival operations, a large amount of coal must be mined and sold. To deny a tenant for life the right to mine largely, would be to deny him the right to mine profitably—to shut him up to mining for his own fuel merely. If he can not be restrained, and that he can not was settled in *Neel v. Neel*, neither can his alienees. They possess his full right to mine and sell, and for these purposes to make new openings, to build railroads, and to supply all ordinary facilities. Nor are such improvements necessarily injurious to the remainderman, for the estate is liable to fall in at any moment, and when it comes to him he takes it with all that has been added to develop and improve it.

But it is said that on the western slope of the Alleghanies the seams of bituminous coal are so few and thin, that tenants for life, if permitted to introduce modern facilities for mining, would exhaust lands so held, and leave them ruined on the hands of those in succession. Should this happen, it would be no more than occurs in every life estate in chattels which perish with the using. So long as the estate is used according to its nature—in *forma doni*—it is no valid objection that the use is consumption of it; and it is no fault of the tenant that it is not more durable: Holman's App. 24 Pa. St. 174.

But if the objection urged be worthy of more consideration on account of the peculiarities of the great western coal field, it may be suggested that it is quite competent for the legislature to provide for taking an account between tenants for life and those in remainder, that would do absolute justice to each.

Similar statutory provisions exist now for tenants in common. It is possible, indeed, that the chancery powers already possessed by the courts, might, by account, afford adequate relief; but, however this may be, it is clear that estrepement is not the remedy, for that would deny him the enjoyment of the estate in the only practicable manner its nature will permit. This is the point we are called on to decide now, and it must be ruled against the plaintiff.

The other question presented by the case stated, is answered, we apprehend, by the provision in the will, apparently overlooked in the argument, that in case of the death of either of the children of the testator, before arriving at twenty-one years of age, without issue, the estate should go over to the survivor. Here were cross-remainders in fee, and on the death of Hannah, William took the estate, not as her heir at law, but under the will of their father; and when William died without issue, the half brothers and sisters could not take from him because they were not of the blood of the ancestor—the testator. But the children of Mrs. Irwin, a deceased sister of the testator, were of his blood, and on them, therefore, the law cast William's estate when he died.

Judgment affirmed.

LYNN'S APPEAL.

(31 Pennsylvania State, 44. Supreme Court, 1857.)

¹ **Rights of tenant for life.** Tenant for life may work quarries or mines opened upon the land before the commencement of his life estate, and may also cut timber necessary to clear the land or for other purposes of husbandry.

Waste not presumed. To charge a tenant for life with waste committed to the injury of the remainderman, the evidence must affirmatively show that the acts complained of constituted waste; the presumption is in favor of the tenant for life.

The rights and privileges of tenant for life are greater in Pennsylvania than under common law in England.

An executor can not be charged, as such, with acts of waste done under another capacity.

Interest will not be charged against an executor or administrator who pays over to those entitled thereto, within a reasonable time, the funds accruing in his hands.

¹ *Gaines v. Green Pond Co., Post, 153.*

Appeal from the Orphan's Court of Fayette County.

On the 31st of August, 1840, Ayers Lynn made his will which was proved the 3rd of December of the same year in which he bequeaths all his personal estate, after payment of debts, to his wife, and adds: "I also give and bequeath unto my wife, Charlotte, above named, all the profit and proceeds that may arise from all and every part of my real estate during the term of her natural life." He also directed that after the death of his wife, his real estate should be sold by his executors and the proceeds divided among his children, deducting certain sums advanced by him to several of them. He appointed his son, Isaac Lynn, and John H. Tarr executors, who accepted the trust and proceeded to administer the personal assets. The widow continued to reside upon the farm until 1845, Isaac Lynn acting as her agent and manager, when she removed with her family to Uniontown. Isaac Lynn, the executor, rented the farm from the widow, and continued in possession as her tenant till the spring of 1850, when she returned to the farm and resided with her son, Andrew Lynn, upon it, they carrying on the farm operations together until 1853. At that time she rented one half of the farm to Andrew at \$170 per year, and the other part was occupied by Isaac, but upon what terms does not appear. Charlotte Lynn, the widow, died intestate on the 6th of January, 1885, in the State of Illinois, at the residence of another son.

John H. Tarr, one of the executors, in 1851, removed to Knox county, Ohio, and has continued to reside there ever since.

During the time that Isaac Lynn occupied the real estate under his mother, he sold licenses to various persons to dig coal and limestone and to cut timber on the premises amounting, according to the estimate of the auditor, to \$212.37. These were sold principally to persons residing in the neighborhood and were for the most part paid for in necessities furnished to the family.

After the death of the widow the executors sold the real estate, and Isaac Lynn filed his account charging himself with the proceeds received by him and interest, amounting to \$15,048.33, and praying credit for various items of expense incurred in making the sale, etc. And also five per cent. on the amount

as commissioner of the executors, amounting to \$752.41. The conveyances of the real estate were made to the purchasers on the first of April, 1856; the first payment of one third of the purchase money made to the executor being \$4,735.33. This amount or the greater part of it, was paid over to legatees, in June, August and November, 1854, and no interest was charged upon it in the account, as filed to December term, 1856.

To this account the legatee filed exceptions, alleging that the executor should have charged himself with the whole amount of the proceeds of the sale of the real estate, as the other executor had become a resident of another State. That he had not charged himself with the timber, limestone and coal taken from the real estate since the death of the testator; to various items of credit, and especially the commission of the executors; and also that the accountant should have charged himself with interest on the first payment, from 1st April, 1856.

The account and exceptions were referred to E. P. Oliphant, Esquire, as an auditor. He restated the account charging the executor with the sum \$212.37, for timber, coal and limestone taken from the farm during the life of the widow. He also struck out two small items of credit for which there appeared to be no vouchers; refused to charge the accountant with interest on the first payment, or to abate the commissions claimed.

To this report exceptions were filed by both parties; and the court below (Gilmore, P. J.) directed the account to be reformed, by reducing the commission of the executors to four per cent. and by charging interest for four months on first payment, amounting to \$94; and with such alterations confirmed the report. And from this decree Isaac Lynn, the executor, appealed.

J. B. & A. HOWELL, for appellant.

PATTERSON, for appellee.

The opinion of the court was delivered by LEWIS, C. J.

The executor of Ayers Lynn has been charged by the orphan's court with \$212.37 for "timber, lime and coal taken from the

freehold to the prejudice of the reversionary interests," while he was in possession of the land as the tenant of the widow, who held the estate for life. If the coal mines and limestone quarries were open when the life estate commenced it is very clear that the tenant for life had a right to work them. If the timber was cut in the process of clearing the land, or for other purposes required in the reasonable cultivation of it, or for keeping the premises in repair it is not such waste as renders the tenant for life liable to the remaindermen. It is not necessary, in this case, to decide whether a tenant for life has a right to open mines and quarries. His privileges under the law of Pennsylvania are much greater than those recognized by the common law of England. If he exceeds them, the act of 10th April, 1848, gives the remaindermen a right to apply to the court of common pleas for a writ of estrepement. That act expressly declares that the tenant for life "shall not be restrained from the reasonable and necessary use and enjoyment of the land and premises in his possession," and authorizes that court to "inquire into and determine the nature and extent of said use and enjoyment." As no complaint was made against Charlotte Lynn in her lifetime for the alleged waste committed by her tenant during the existence of her estate for life, and as the auditor has not found any facts which authorize the court to declare that he exceeded the rights of a tenant for life, we think he ought not now to be charged with these items in his account as executor. What he did as tenant of his mother was not done in his capacity of executor. The charges are not stricken out on that ground, but because no facts are found sufficient to support them. The auditor can not draw the whole law and the facts into his cognizance so as to exclude the supervision of the court, by merely stating that the acts complained of were to the prejudice of the reversionary interests.

The presumption is in favor of the tenant for life until the contrary appears.

The auditor states sufficient reasons for not charging the accountant with interest on the first payment, for the real estate sold under the power of the will, and his report in that particular ought to be confirmed.

The other objections to the decree of the orphan's court are overruled.

It is ordered that the decree of the orphan's court be reversed and that the account as restated by the auditor, be corrected by striking from the charges against the accountant the items for coal, timber and stone, amounting in the aggregate to \$212.37 and by striking from the credit allowed for commissions the sum of \$152.26. With these corrections the auditor's report is confirmed, and a decree made accordingly.

BAGOT V. BAGOT.

LEGGE V. LEGGE.

(32 Beavan, 509. The Rolls Court, 1863.)

Dormant mine. It is a question of degree, to be established by evidence, whether the working of a dormant or abandoned mine by a tenant for life is waste or not: *Semle*, that a mine, the working of which had been discontinued for twenty or thirty years, in consequence of its not having been remunerative, might, after that time, be worked by a succeeding tenant for life; but a mine, the working of which has been abandoned by the owner of the inheritance for the advantage of the property, can not be worked by a succeeding tenant for life.

Laches—Account against life tenant. After long delay in taking proceedings against tenant for life committing waste, the court endeavors to deal liberally with him, and will charge interest from as late a period as the circumstances can suggest.

Tenant for life committing waste. When a tenant for life impeachable for waste, improperly, knowingly and wilfully commits waste, he can not derive any benefit from the timber cut.

The first of these suits was instituted by a tenant in tail to make the estate of a prior tenant for life, who was impeachable for waste, liable for acts of waste committed in his life time. The second was for the administration of the estate of such tenant for life.

The estate was derived from the Rev. Walter Bagot, who, by his will, dated the 4th of May, 1798, devised all his real estates, subject to a term of 1,000 years, for payment of debts, legacies, etc., to his eldest son, Egerton Arden Bagot, for life,

with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of Egerton Arden Bagot successively in tail male, with similar limitations in favor of each of the testator's other sons, Walter, William, Harvey, Humphrey and Ralph, successively, for life, and of their respective issues in tail male, with an ultimate remainder to the right heirs of the testator. The will contained no provision to exempt the several tenants for life from impeachment for waste.

The testator died in July, 1806.

Egerton Arden Bagot thereupon entered into possession of the real estates, and he continued in possession down to his death in February, 1861. Prior to this time, the testator's sons, Walter, William, Harvey and Humphrey, had died without issue male, and at this time, the estate stood limited to Ralph Bagot for life, with remainder to his son (the plaintiff) William W. Bagot, in tail. The latter was an infant, having been born on the 24th of January, 1847.

Egerton Arden Bagot had, by his will, after reciting the will of his father, devised certain hereditaments of his own to Ralph Bagot for life, with remainder to his first and other sons in tail male; and he discharged his paternal settled estates, and all persons entitled thereto, "from all sums of money, claims, rights and interests, to which he had become entitled previously to the date of his will, in consequence of his having discharged or purchased any incumbrances affecting the said paternal estates, or purchased leasehold interests granted out of or affecting the same." And he declared, that if any person taking any interest under his will in his estates should, in any manner, dispute or call in question any of the dispositions of that, his will, or make any claim against his estate, in respect of any dealings or transactions which had taken place with or in reference to paternal settled estates, that then he should forfeit his estate. He also, by codicil, directed that the amount of any such claim, if established, should be paid out of the incumbrances on his paternal estates, which had been paid off by him and out of his own devised estates.

The first suit was instituted in April, 1862, by William W. Bagot, the infant tenant in tail, against his father, the tenant for life in possession, and the executors of Egerton Arden

Bagot. The bill stated that "during the period when Egerton Arden Bagot was in possession as tenant for life of the real estates so devised, as aforesaid, by the will of Walter Bagot, he, from time to time, with full knowledge that he was impeachable for waste, committed divers acts of waste, by felling timber other than for necessary repairs, and by opening and working new mines and mines which had been abandoned, and mines which were not in a state of working at the death of the testator, Walter Bagot, some whereof had never been worked by the testator or by any other person whilst he was in possession thereof, and others, if they had been so worked whilst he was in possession thereof, had nevertheless been abandoned or were lying dormant at his death; and that Egerton Arden Bagot, from time to time, sold the said timber and minerals, and obtained large sums of money as the proceeds thereof, which he applied to his own use, and thereby he amassed a very considerable fortune."

The bill prayed a declaration that the personal estate of Egerton Arden Bagot was liable to answer to the plaintiff for all the benefit and profits received by him from the acts of waste, with interest from the periods they were respectively received, and it prayed an account of the timber improperly felled, and also of the coals and minerals gotten by him from mines under the estates which were unopened, abandoned or dormant at the death of Walter Bagot, the testator, distinguishing those prior to the plaintiff's birth in 1847.

The executors of Egerton Arden Bagot, by their answer, said that their testator had granted several leases for his life of divers coal mines under the Lancashire estate, some of which were new and unworked, and that others were lying dormant; and that he had felled timber on the settled estates; and that, to the best of their knowledge, he had received for coals from unopened mines, before the plaintiff's birth, £7,923, 15s. 4d., and after his birth, £11,752, 18s. 2d.; from dormant mines, before his birth, £9,759; after his birth, £1,375; for timber cut, £4,330, 13s. 9d. They stated that none of the mines had, as they believed, been worked from 1775 to 1806, while Walter Bagot, the settler, was in possession. They also stated their belief, that part of the timber, or the proceeds thereof, had been employed or expended in rebuilding, re-

pairing and improving the estates, and they claimed to set off or retain all just allowances in respect of some incumbrances which had been paid off by Egerton Arden Bagot, together with the outlay and expenses he had incurred in rebuilding, and in repairs and improvements, which they alleged were far beyond what could have been required by a mere tenant for life. They also insisted on the clause of forfeiture and the benefit of the provision contained in the will and codicil of Egerton Arden Bagot.

Mr. OSBORNE and Mr. G. M. COLT, for the plaintiff.

Mr. HOBHOUSE and Mr. LEWIN, for Ralph Bagot, the tenant for life.

Mr. SELWYN, Mr. BAGGILLEY and Mr. RASCH, for the executors of Egerton Arden Bagot.

Mr. ATKIN, for the Hon. Honora Legge and other defendants in the suit of Legge v. Legge.

THE MASTER OF THE ROLLS.

The object of this suit is to make the estate of Egerton Arden Bagot, deceased, liable for certain acts of waste committed by him on the family estates, when he was in possession of them as tenant for life. That his estate is liable to some extent is not disputed; the questions I have to determine relate to the extent of that liability, and the mode of application of the sums which will have to be paid in respect of that liability.

The property was settled by the will of the Rev. Walter Bagot, made in the year 1798. By it he created a term of 1,000 years, the trusts of which were to raise money in aid of his personal estate, and also the sum of £1,800, which, under his marriage settlement, he was bound to pay, and subject thereto he gave the estate in question to Egerton Arden Bagot, his eldest son, for life, with remainder to his first and other sons in tail male; and in default, to the second and every other son of the testator for life, with remainder to their first and other sons in tail male, respectively, ending, in the event of failure of sons of all the prior tenants for life, to the defend-

ant, the Rev. Ralph Bagot, the sixth son of the testator, for life, with remainder to his first and other sons in tail male. As to no one of the estates for life given does his will contain any provision freeing the tenant for life from impeachment for any waste committed by him.

The second, third, fourth and fifth sons of the testator have all died without issue male during the life of Egerton Arden Bagot. The plaintiff is the eldest son of the defendant, the Rev. Ralph Bagot; he is the heir in tail in remainder; and if he survives his father, and do not previously alienate his inheritance, he must necessarily be the heir in tail in possession.

The testator died in July, 1806. His eldest son, Egerton Arden Bagot, thereupon entered into possession of the settled estates, and he continued in such position down to the time of his death, which took place on the 4th February, 1861. The property consisted of the family mansion and estate in Warwickshire, and of an estate in Lancashire, which was possessed of valuable minerals. I have already noticed that Egerton Arden Bagot had no power to commit any waste, and it is shown that he was aware of his liability in this respect. Notwithstanding this restriction, he cut timber to a large extent, and he worked the minerals, both by working old abandoned mines and by opening new ones.

With respect to the abandoned, or, as they are called in the pleadings and evidence, "the dormant mines," I am of opinion that he is not shown to have been guilty of any waste in working these. It is always a question of degree, to be established by evidence, whether the working of a mine which has been formerly worked is waste or not. There is no doubt that a tenant for life, though impeachable for waste, may properly work an open mine. A mine not worked for twelve months or two years before he became possessed of the property, must still be considered to be an open mine. A mine not worked for a hundred years could not, I think, be properly so treated; and my present opinion is that a mine which had not been worked for twenty or thirty years, from the loss of profit attending the working of it, but which, from the rise in price of iron and coal, had become remunerative, might, without waste, be worked again by a succeeding tenant for life; but if

the abandonment of the mine had taken place long ago, and if the owner of the inheritance had discontinued the working, with a view to some advantage to the property, which he considered would accompany such discontinuance, apart from the profits to be made from the sale of the mineral, then I doubt whether a succeeding tenant for life could properly treat that as an open mine. I state my general view of this subject, but I doubt whether I have before me sufficient materials to enable me to come to a satisfactory conclusion on this point.

The opening, also, of a fresh pit may be, not the opening of a new mine, but only the more advantageous mode of working an old one, and may possibly be done without any injury to the inheritance, if the surface of the spot where it is opened be of no or little value to the estate. I am of opinion, therefore, that as to the mines, it may become necessary to direct an inquiry to the effect I shall presently state.

Again, on the subject of the timber, it does not necessarily follow that all cutting of timber is waste. In many places oak coppice is felled regularly every sixteen or eighteen years, leaving poles which are regularly cut every second fall, *i. e.*, every thirty-two or thirty-six year. This timber would, I apprehend, constitute the fair profits of the land to which the tenant for life would be entitled. So, also, I apprehend, that proper and regular thinning of a wood, for the purpose of improving the rest of the trees within certain limits, would not amount to a waste. In one case, *Pidgeley v. Rawling*, 2 Coll. 275, the Lord Justice Knight Bruce held that the cutting of larch trees twenty years old, for this purpose, was legitimately done by the tenant for life, and did not amount to waste. On the subject of the timber felled I am also left in the dark by the evidence, and on this subject, also, I am of opinion that it may be proper to direct an inquiry, the terms of which I will presently state, unless by arrangement a different course can be adopted.

The next question argued before me relates to the mode in which the tenant for life should be made to account for the minerals improperly won by him, and also for the timber improperly cut by him. Two periods are insisted upon by the counsel for the plaintiff, during which the timber was cut and minerals were won, which is, as they contend, governed by differ-

ent principles, viz., the timber cut and minerals won before the 24th of January, 1847, when the plaintiff was born, and the timber cut and minerals gotten subsequently to that period. With respect to the former period, they contend that the plaintiff is entitled to the interest of the money derived from those sources; and with respect to the latter period they contend that he is entitled to the money itself derived from the same, inasmuch as the plaintiff was the first tenant in tail *in esse* when it was cut.

With respect to the claim of Edgerton Arden Bagot, the tenant for life who cut the timber, I held in *Lushington v. Boldero*, 15 Beav. 1, following *Garth v. Cotton*, 3 Atk. 751, 1 Dick. 185, and 1 Ves. Sen. 524, and many other cases, that the tenant for life could not derive any benefit from the timber improperly, knowingly and wilfully cut by him. Upon reviewing the authorities I still retain that opinion; but at the same time, in considering the cases, it appears that, after a long time has elapsed before the bill has been filed, the court has usually endeavored to deal with the tenant for life in a very liberal manner, considering, and, as I think, justly considering, that, in most cases, it would not be for the benefit of the parties concerned to go into a long and expensive inquiry as to the nature of the timber cut and the circumstances under which it was cut. If this be a correct view as regards timber, it is manifest that the same consideration would apply to the getting of mineral, when there is such a complication of circumstances as exist in the present case, arising from the difficulty of deciding which were opened and which were unopened mines. Accordingly, in *Garth v. Cotton*, although the principle I have mentioned was broadly laid down by Lord Hardwicke, he considered that, instead of any such inquiry, it would be better simply to give interest from the date of the death of the tenant for life, and a similar principle was acted upon in the case of the *Duke of Leeds v. Lord Amherst*.

Here, the tenant for life was in possession of the property from July, 1806, till February, 1861, a period of fifty-four and a half years; no complaint was made or any opposition offered to him, during the whole of that period, as regards his dealing with the property as he thought fit, although any one of the tenants for life in remainder, or even the trustees, to

preserve contingent remainders might have done so. It is true that this negligence, on their part, does not affect the plaintiff, who was not born till 1847, and is still an infant; but still, taking into consideration the family relations between these persons (a circumstance which courts of equity, not merely in a case of family agreements, but in many other cases, treat as a matter of moment and one to be regarded in dealing with questions between relatives), and having regard to the fact, that the father of the infant plaintiff was one of the tenants for life, by whose desire, and I must also say properly, the present suit, I have no doubt, was instituted. Taking all these matters into consideration, I am disposed to act rather on the course adopted in *Garth v. Cotton*, by Lord Hardwicke, than to enforce the strict right of the parties, after the delay and expense which would be occasioned by prosecuting the inquiries I should be otherwise compelled to direct. If, therefore, the defendants, the executors of the tenant for life, will consent to adopt the accounts furnished by them as conclusive against the estate of their testator, I will declare that the estate of the testator, Egerton Arden Bagot, is liable for £4,330, 13s., 9d., for timber cut on both estates, and for the sum of £19,676, 13s., 6½d., in respect of minerals won from unopened mines, but that his estate is not liable in respect of the minerals from the dormant mines; and I will then direct interest at £4 per cent. per annum, to be calculated on the two sums I have already stated (amounting in the whole to £24,007, 7s., 3½d.) from the day of the death of the testator, and charge his estate with that amount. Against this the estate of the testator will be entitled to set off any incumbrance affecting the estate, which would not properly have been paid out of the estate, under and by virtue of the term of 1,000 years created by the will of the Rev. Walter Bagot, deceased. I should then direct the amount, when paid, to be invested as part of the settled estate, and the interest thereof to be paid to the defendant, the Rev. Ralph Bagot, during his life, on the assumption that the waste had not been wrongful to this extent, viz., that the inheritance had not been injured thereby, and declaring the plaintiff absolutely entitled to the money, subject to the life estate of his father therein.

If this be acceded to on the part of the advisers of the plaintiff, I think that it would be proper, on the part of this court, to accept this species of compromise on his behalf. If not, I should direct, first, an account of what minerals had been gotten and won by the late tenant for life, Egerton Arden Bagot, prior to the 24th of January, 1847, distinguishing between such of the minerals as were gotten from old mines remaining dormant and from mines newly opened by him. In taking such inquiry, I should ascertain for how long and under what circumstances such mines had remained dormant or unworked; also, whether, with respect to the new pits sunk or opened, any were so sunk or opened for the purpose of facilitating the old workings, or for the purpose of opening fresh mines, and I should also state the circumstances under which such fresh workings were commenced. I should then direct a similar account as to the timber, distinguishing it as to the timber felled prior to the 24th January, 1847, and that felled subsequently; distinguishing also what parts of such timber, if any, were felled in the nature of thinnings, and whether any and what parts of such timber were properly felled with regard to the benefit of the estate, and also take an account of what parts of such timber, if any, were employed in the repairs of the settled estate.

Upon the coming back of that account I should direct what should appear to be the amount of all timber improperly cut and minerals improperly gotten prior to the death of the plaintiff, to be invested as part of the settled estates, and the interest thereon since the death of Egerton Arden Bagot to be paid to the defendant, the father of the plaintiff. As to that improperly cut subsequently to the birth of the plaintiff, I should declare the plaintiff to be entitled to the proceeds, as the first tenant in tail, together with interest at £4 per cent. per annum on that amount, from the time when the same moneys were respectively received. As to all that which on the inquiry should appear to have been timber properly cut and minerals properly won, that is by which the inheritance was not injured, but such as this court would have directed, had an application been made to it by the tenant for life for that purpose, I should direct it to be invested as part of the settled estate, and treat Egerton Arden Bagot as entitled to

the interest arising therefrom during his life, and since his death charge his estate with interest on it at £4 per cent. per annum, to be paid to the present tenant for life.

It is plain that it would be troublesome and probably most tedious and expensive to work out all these inquiries, and my opinion is that the course I have above suggested, as one to be adopted in lieu of such inquiries, would be the best for all parties, the more so as after the great lapse of time; I should take the amounts and prosecute the inquiries in the manner most liberal to the deceased tenant for life, and where, from the difficulties occasioned by the delay, evidence was wanting, I should make all reasonable presumption in favor of his estate.

In either case his estate will be allowed, in discharge, the incumbrances on the estate paid off by him and not provided for by the will of the original testator; but in neither case will he be allowed anything in respect of the improvements he has made on the settled estates, whether they be lasting improvements or otherwise; nor will he be allowed anything in respect of repairs, except timber in the rough which may have been employed for that purpose; nor anything in respect of the interest accruing on the incumbrances which it was his duty to keep down.

In intimating the course I should probably adopt if these accounts and inquiries were prosecuted, and by declaring the plaintiff, the first tenant in tail, entitled to the *corpus* of the fund produced by the improper felling of the timber in his lifetime, I beg to be understood as not expressing any opinion that he would have been so entitled if he were (if I may be allowed the use of an expression which accurately conveys my meaning) only presumptively tenant in tail in remainder, instead of being, apparently, a tenant in tail in remainder—that is, if he had not been a person who, if he live long enough, must necessarily become entitled to the estates in possession. I by no means assent to the doctrine supposed to be laid down by some of these cases—but, as I conceive, erroneously so supposed—that if an estate be limited to six persons for life, in succession, with several successive estates tail to their first and other sons in succession, and the first tenant for life commits waste without collusion with any one, the money

arising from the sale of the inheritance wasted would belong to the eldest son of the last tenant for life, because he happened to be the only tenant in tail then in existence, and that he could thereby deprive all the future sons of the prior tenants for life, who should be afterward born, of the inheritance settled on them. If the prior tenant for life could do this, as to a portion, the principle would apply equally to the whole, and he might, provided there was no collusion with the tenant in tail *in esse*, give an estate, or a valuable part of it, to a remote descendant, to the exclusion of many children, who, in the ordinary course of nature, would afterward come into existence. I do not think that this proposition is intended to be laid down in any of the cases referred to, and I am unwilling to do anything which might lead to the supposition that I considered this to be the law.

I have, I think, in the observations I have already made, disposed of the principal objections urged by the counsel for the executors of Mr. Egerton Arden Bagot; but I notice more especially one, from the pointed manner in which it was put, but which, I think, admits of a ready and conclusive answer. It was argued that the cutting of timber and the winning of minerals by Egerton Arden Bagot was either wrongful or not wrongful; in other words, that it was either wrongful or rightful; that, if it was wrongful, it was a case for an action at law, and that, if it was rightful, the money ought to be settled, and he was entitled to the interest of it. I assent to the proposition that, if it was rightful, the money ought to be settled, but I do not concur that, if not rightful, the court ought to leave the parties to their remedy at law. In fact, the death of Egerton Arden Bagot, and the necessity of administering his estate, entitles any one who seeks to make a claim against his assets to seek the aid of this court for that purpose, and to compel the executor either to admit assets or to account for his estate accordingly.

Assuming that, in the case *Legge v. Legge*, which came on to be heard with *Bagot v. Bagot*, and which is brought for the administration of the estate of Egerton Arden Bagot, a decree for administration of that estate shall be made, then I am of opinion that the parties to the latter suit, both the plaintiff and defendant, his father, are entitled, when the

amount of their claims is settled in *Bagot v. Bagot*, to have a direction for leave to prove the amount due to them against the estate of the testator in the suit of *Legge v. Legge*.

In addition to the above decree, which I have intimated and which affects the estate of the deceased tenant for life, Egerton Arden Bagot, I am of opinion that it will be proper, having regard to the facts proved in this case, to direct an inquiry, to ascertain what mines and minerals are now in existence in the settled estate, and what is doing in respect of them, and whether it is for the benefit of the inheritance that any and which of such mines should continue to be worked, and also an account of all profits and moneys derived from the working thereof since the death of Egerton Arden Bagot, and by whom the same have been received, or how the same have been applied. And declare that the proceeds that have already arisen therefrom, and may hereafter arise from the same, ought to be invested as part of the said settled estates, and the dividends arising from the same when so vested, be paid to the tenant for life for the time being of the estates. And, if thought desirable, an inquiry may be taken in like manner, as to the timber now standing on the estate, adopting for that purpose the form of order in the case of *Tooker v. Annesley*, 5 Sim. 235, which I have usually followed in such cases.

With respect to costs, I must treat this as a proceeding necessary for the purpose of establishing a debt against the estate of a testator, the costs of which must be added to the debt to be proved. The defendants, the executors of Egerton Arden Bagot, must be declared to be entitled to have their costs of this suit, as between solicitor and client, out of the estate of their testator. Their conduct has been perfectly proper and regular in every step they have taken in this suit the claims in which it was their duty to oppose, and in opposing to give all information in their power respecting the matters complained of. They were bound to protect the estate of which they are trustees, to the utmost of their power, but in doing so, to conceal nothing, and to submit to act in all respects as the court might direct. This is the course they have adopted, and they are entitled to a perfect immunity from this court for having so acted.

Mr. Osborne stated that the compromise suggested had been declined.

The Master of the Rolls said that the decree must be in the terms stated in his judgment. He also stated that the produce of the windfalls (contrary to the popular notion), did not belong to the tenant for life, but must be invested.

NOTE—Upon appeal to the Lord Chancellor a compromise was effected.

THE PEOPLE EX REL. WILLIAM H. PARKS V. THE
CIRCUIT JUDGE FOR MARQUETTE COUNTY.

(38 Michigan, 244. Supreme Court, 1878.)

Mandamus. An order to stay waste is discretionary, and will not be compelled by *mandamus*.

Waste, no subject of mandamus. If one who is entitled to an order to stay waste does not seek it in an affirmative suit at law, or in equity, he has no remedy for its refusal.

Mandamus. Submitted January 22d. Decided January 23d. Denied.

PARKS & MAPES, for the relator.

PER CURIAM.

Relator purchased on execution a mining lease in an undivided half of certain lands in Marquette county, and after he obtained his deed the defendants refused to surrender possession, whereupon he brought ejectment. He then applied to the circuit court on a showing of various facts to grant an order to stay waste. This motion the court refused and we are asked to grant a *mandamus* to compel it. The form of the lease is not given and therefore we can not consider it.

If the action of ejectment lies on such a peculiar title, and if it was liable to sale on execution, both of which questions are understood to be involved, still the application was one of discretion and not of right, and we can not review that discretion. If the party is entitled to a stay of waste, and chooses to seek it in this form and not in some affirmative suit at law, or in equity, there is no remedy for the refusal to grant the relief.

We need not, therefore, consider the nature of his rights.

Order refused.

ELIAS ET AL. V. THE SNOWDON SLATE QUARRIES CO.
ET AL.

(L. R. 4 App. Cases, 454. House of Lords, 1879.)

Working by mortgagor in possession. The opening of a quarry by a mortgagor in possession enures to the benefit of the mortgagee of the term, so as to render him punishable for waste if he worked the quarry during the term.

Presumptions as to authority for working the quarry. Where it is proved that a quarry was worked, and that there was a lease which would authorize the workings, it will be presumed after a great lapse of time that the workings took place under the lease, and the burden of proof will lie on a party who seeks to show that they were unauthorized.

What is a sufficient opening of a quarry, considered on the facts of the case.

If a mine has been worked for commercial profit, that is ordinarily decisive proof of the right to continue working; taking minerals for some restricted purpose would not give such right, but the fact of commercial sale is not necessarily a criterion of the difference between an open and an unopened mine.

New openings to old mine or quarry. Where a mine or quarry is once open the sinking of a new pit on the same vein, or the breaking of ground in a new place in the same rock is not the opening of a new mine or a new quarry.

This was an appeal from a judgment of the court of appeal, reversing one of Hall, V. C.

The plaintiffs were entitled to the reversion in a farm called Fridd-Issan, in the parish of Beddgelert in North Wales, subject to a term of five hundred years, created in 1802 by way of mortgage.

Morris Griffith, the mortgagee, in 1816, filed a bill for foreclosure and obtained a decree which was made absolute in August, 1820, Griffith having, pending the suit, gone into possession.

There were two slate quarries on the farm called the upper and lower quarries. It was proved that the lower quarry had been worked by the mortgagor for sale before the date of mortgage. It was also proved that in 1811 he granted a lease of the mines and slate under the whole farm in consideration of receiving one fourteenth of the profits to arise from work-

ing them. That lease was treated as still in force upon an investigation of the title, which took place in 1820. But there was a conflict of evidence as to when the upper quarry was first opened. No power was given in the mortgage deed to open quarries or commit waste.

In 1866 William Morris Griffith became entitled to the term. Certain under-leases had been granted by his predecessors of the quarries on the farm, which under-leases had become vested in the Snowdon Slate Quarries Company (Limited). By an indenture dated the 30th of April, 1863, William Morris Griffith conveyed all his interest in the farm to the Snowdon Slate Quarries Company for £5,000. The plaintiffs, who first became aware of their title to the reversion upon receiving, in December, 1872, an application from William Morris Griffith, asking them to release their right to him, filed a bill against William Morris Griffith and the Snowdon Slate Quarries Company for an injunction to restrain the company from working the quarries, and for an account of profits against the company and royalties against Griffith.

The Snowdon Slate Quarries Company was soon afterward wound up, and the farm and quarries were sold to the West Snowdon Slate Company, notwithstanding the protest of the plaintiffs' solicitor. The West Snowdon Slate Company were then added as defendants.

The defendant Griffith by his answer disclaimed all interest in the property, and alleged that the royalties received by him did not exceed £20, and were received more than six years before the bill was filed.

Hall, V. C., gave judgment for the plaintiffs against all the defendants. On appeal the court of appeal reversed the judgment of the vice chancellor.

The plaintiffs appealed against the judgment of the court of appeal, so far as it related to the defendant companies.

Mr. OSBORNE MORGAN and Mr. FORD NORTH (Mr. ROLLAND with them), for the appellants.

Mr. DICKINSON and Mr. HORNE PAYNE, for the respondents.

The Lord Chancellor (Earl CAIRNS).

My lords, the argument of this case has occupied at your lord-

ships' bar a considerable time, but the result of that argument is that every fact in the case has, I think, been brought with great clearness before your lordships' attention, and I shall be able in a very short space to submit to your lordships the view which I at least take of the case now presented to us.

My lords, I will in the first place remind you of the mortgage title. That starts in the year 1802, when the mortgage was made by Owen, the then owner of the inheritance, to Griffith, for 500 years, and I pass over as immaterial the farther charge which took place a few years afterward. From 1816 to 1820 proceedings were going on for foreclosure of this mortgage. In the course of those proceedings, namely in 1818, Griffith appears to have entered into possession, and the proceedings were terminated by complete foreclosure in 1820. From that we pass on, still only dealing with the mortgage title, till 1847, when a lease was made by a son of this Griffith to three persons for the purpose of adventuring in and continuing to work mines or quarries upon the property, and under that lease the present respondents claim.

Now, turning on the other hand to the title to the inheritance that continued in the mortgagor Owen up to the time of his death in 1837, therefore, from the complete foreclosure in 1820 for seventeen years he (the mortgagor) was in existence, and was the owner of the inheritance of the property in fee simple. He died in 1837, and was succeeded by Rice Owen, his heir, who continued in life until 1860, a period of forty years from the foreclosure. When he died, in 1860, the inheritance fell to one of the present appellants.

That being the title, to the mortgage term on the one hand and to the fee on the other, let me remind your lordships in a few words of the actual facts which are proved with regard to the opening of the slate quarries upon the property. And I must first observe with regard to these facts that, whatever may be their proper description, there is no controversy as to them, because they are facts which come from the witnesses on the one side only, in their evidence in chief, and in their cross-examination; and although criticisms may be made as to the limited extent to which these witnesses speak, there is nothing which shakes their credibility or their accuracy so far as they do speak.

My lords, it is sufficient for my present purpose that I should state what I am about to state as to their evidence. Their evidence appears to me to amount to this: that in 1812 and 1814 (upon the evidence of witnesses old enough to remember those years) there were opened quarry holes or quarries, whichever may be the proper word, in the *locus in quo*, that is to say, the land subject to this mortgage. It is a question upon the evidence, what the size of the openings was, but that has been left as it is upon the evidence to which I have already referred, the evidence of one side. No evidence has been contributed from witnesses equally old, or from any witnesses at all, upon the other side. The witnesses, it is true, do not pretend to speak with certainty upon the exact size of the openings, but in a mineral country, where the terms may be supposed to be well known and persons accustomed to use the terms proper to describe what actually is in existence, these witnesses all, without exception, speak of that which existed upon the property as what they would describe as open workings, and they are careful to say that they were workings which for some purpose were actually worked; for they saw certain slates taken out of them and dressed and laid on one side, and the debris in other places, which would show that slates had been taken out and worked. That evidence is added to by the evidence of another witness, who speaks with very considerable accuracy of what he saw in 1818. What he saw then was working of the same description; it may have occurred between 1812 and 1818, or it may have been the same working which the other (the older) witnesses saw in 1812. Then passing on to 1825, or thereabout, your lordships have clear testimony of working of a very much more extensive description at that time. I say "more extensive," because it appears to me the witnesses agree in saying it was carried on by a number of persons who were acting upon a system, and for some purpose or other, who were acting as a company, or as persons engaged in a common undertaking, for the purpose of either trying or carrying on the works.

Now, that being the character of the evidence, which is the only evidence in the case, of course it would have been perfectly competent for any person interested to show that the working, such as I have described it to be, took place without

the knowledge, and without anything that could be called consent or authority, on the part of the owner of the inheritance. Nay, more, it might have been shown that the workings were actually workings by way of trespass, and had not even the consent of the termor, the mortgagee; or, it might farther have been shown that those workings were not workings of the ordinary kind for the purpose of commerce, for the purpose of disposing of that which was gained; but were workings for what I may call home consumption, for some ordinary purpose with reference to the farm on which the workings took place. Any one of those things might have been shown, but no one of them has been shown in opposition to the evidence which I have referred to, and that evidence stands, *valeat quantum*, without any counter evidence for the purpose of putting a complexion upon the character of the working which I have mentioned.

That being the state of things, then, we proceed a step farther, and your lordships find this important element introduced into the case. It is proved without contradiction, and even I may say without controversy, that in 1811, after the mortgage had been made, for that was made in 1802, but while the mortgagor was still in possession of the property, and was representing the property, and was for all practical purposes, in accordance with the sense in which the word is commonly used, in ownership of the property, living upon, at all events exercising the ordinary acts of ownership over the property, he made a lease covering the land subject to the mortgage. I pass by the lease of 1807. What is stated in that lease of 1811 is, that it was a lease from Robert Bulkeley Owen to Richard Owen, Hugh Hughes, and Richard Henry Davys, of slate rocks and beds of slate, and all mines, etc., from that date for twenty-one years at the farm of "one fourteenth share of clear profits;" and that lease is recognized as subsisting in 1815, because in certain conditions of sale of the property advertised in that year, it was spoken of as a lease to which the property was subject.

That lease being therefore established as having been made by the owner of the inheritance at the time that he was in possession, what appears to me to result from that fact is this: It appears to me that just as any quarry opened by the

owner of the inheritance himself, even although opened after the date of the mortgage,—provided it had been opened while he still was in possession, and while he still was acting as the owner of the property—just as any quarry opened by him would enure to the benefit of the mortgagee after he took possession and foreclosed, and would entitle him to call that an opened quarry, and to go on and work it as a source of profit arising from the property, so also any quarry opened by the lessees under this lease of 1811 would give the same rights to the mortgagee. And, my lords, this also would flow from the lease of 1811; it not only would result from it that any quarry opened under that lease upon any part of the property would be lawful, but it would also stamp that quarry, when opened, with a commercial character, because the lease in its nature and in its terms, is a lease for the express purpose of making money by quarrying as a commercial operation, and the product, the remuneration, upon which the landlord relies is not a fixed sum by way of rent, but is, as it were, a sum arising from a partnership with those who were to be the tenants. He is to have a share of the profits of the quarry. Therefore, you have it in the clearest way that, provided it be established that any quarry was opened under the powers of that lease, that was a quarry, the opening of which was rendered lawful by the owner of the inheritance and was stamped by him as an opening for the purpose of commerce on the property.

Then, my lords, that being so, the only question is, whether these openings to which I have referred, whether those quarries, which I have shown were commenced and carried on to a certain point at all events, were quarries the opening of which is to be referred to this lease of 1811 or not. Now, my lords, there it is that it appears to me to be extremely important to consider upon whom the *onus* in the case lies, and I am far from laying down or wishing to suggest to your lordships any general rule with regard to the question of the person upon whom, in a case of this kind, the *onus* must lie. If the case is recent, if there be no lapse of time or other circumstance to be brought into consideration, if you have simply a case of a term of years granted, and the landlord comes forward and says, “I complain that my termor is working a quarry upon his land,”

in that state of things it may well be that it is for the tenant to answer and to show that the quarry was opened at the time when he entered into possession. But it may be very different when a long lapse of time has occurred, and especially it may be different, and it appears to me it must be different, where your lordships have the singular fact which I have already referred to as existing in the present case, namely, that from 1820 to 1860, at all events for a period of forty years, there was the owner of the inheritance, of full age, competent to act and to bind himself, and living more or less in the neighborhood of the land in question, and that, during the whole of that time, that owner of the inheritance made no complaint whatsoever as regards the opening of these quarries, or the existence of these quarries, or that which was done with these quarries, at the dates to which I have referred.

Now, my lords, that being so, and it being the case that your lordships are called upon, after this lapse of time, to examine into acts which were done between the year 1811 and the year, we will say, 1825, and having it proved in evidence that those acts were done, and having before you a document which would render those acts lawful, and would make it a right and proper thing that those acts should have been done, and being called upon to say what was the power or the authority under which the acts were done, it appears to me that the presumption will be and ought to be, by any court, that they were done under that authority which would render them lawful, unless those who are in the position of the appellants in the present case will come forward and can satisfy you by proper and apt evidence that the acts were done, not under the authority which would render them lawful, but were done without authority and without any connection with the lease of 1811.

My lords, there has been no attempt on the part of the appellants to disavow the acts which were done from the lease of 1811. It appears to me that the *onus* lay upon them to do so. It appears to me that if there was any ignorance on their part of the lease of 1811, when it became known to them they ought to have been able to disconnect the acts from the lease, and might have had time accorded to them by the court for the purpose of producing evidence upon the subject. They

have not produced any evidence of the kind, and in that state of things it appears to me that the legitimate and proper presumption for the court to make is, that it was the lease of 1811 which led to and gave authority and legality to the acts done in the shape of quarrying under the property in question, and that that presumption is as strongly fortified as any presumption can be, by the farther circumstance that for forty years no complaint was made of these acts by the owner of the inheritance, who might have complained of them.

My lords, under these circumstances, without going farther into the details of the case, it appears to me that the conclusion of the court of appeal was correct, and I submit to your lordships that this appeal should be dismissed with costs.

LOED SELBORNE—My lords, I am of the same opinion. The facts of the present case, which admit of no controversy, are, that when the respondents' predecessor in title entered into possession, foreclosed his mortgage and became the absolute owner of the term of five hundred years created in 1802, the whole of this property was subject to a lease granted by the reversioner while in possession, by which it was contemplated and intended that slate quarries should be worked in it, without distinction of the upper from the lower part, for commercial purposes; that the lower quarry was then confessedly open, and that the upper quarry, which alone is now in question, has been worked, to a greater or less extent, for or with a view to commercial purposes, from time to time, since that date, as well during the continuance of the term granted by that lease as afterward, the earliest date of such working which is fixed at all distinctly by the evidence being in or about 1826, forty-seven years before the filing of the bill.

There are many circumstances more or less material to a correct appreciation of these facts, of which neither of the parties to the present controversy has given, perhaps at this distance of time neither of them was able to give, any evidence. The existence of the lease of 1811 is proved by notes or other statements in the nature of admissions made by the solicitor, who in 1815 represented the predecessor in title of the appellant; but the lease is not itself in evidence, and any light which might have been derived from a knowledge of its precise contents is wanting. It seems to me to be uncertain,

upon the whole evidence, whether Griffith, the mortgagee, under whom the respondents claim, was a party to it or not. From what had taken place when an earlier lease of the lower quarry was contemplated (if not granted) in 1808, from the relations (so far as they appear) between Mr. Williams, who prepared that earlier lease as solicitor for both the mortgagor and the mortgagee, and Mr. Pritchard, who prepared the lease of 1811, and from the fact that two of the lessees of 1811 were also two of the intended lessees of 1808, there is, I think, a strong probability that the mortgagee would have been made a consenting party to it. But, on the other hand, it seems clear that in 1815 this lease was not among the documents of title then in the possession of Mr. Williams, of which an abstract was furnished by him to Mr. Pritchard, and in Mr. Pritchard's notes of that date it is described as a lease from Robert Bulkeley Owen to Richard Owen, Hugh Hughes and Richard Henry Davys, not mentioning Griffith. Whether Griffith was a party to it or not, any workings proved to have taken place under that lease would, I think, have been decisive of the present controversy; and if he was a party to it, its mere existence, when his title became absolute, would have been enough, in my opinion, to make the quarry now in question then open as between him and the reversioner. The working of both quarries, in or about 1826, by a company locally connected with Carnarvon, under a quarry agent from Maennturog, is left unexplained, unless it ought to be referred to that lease. On all these points the question of *onus probandi* and of the presumptions of fact, if any, which under such circumstances and after such lapse of time ought to be made, becomes highly important.

It is not, however, without aid from some other facts, besides those already mentioned, that these questions have to be determined. There is the evidence of several old witnesses who prove that there were, before the lease of 1811 was granted, two pits (or, as they call them, "holes") already opened within a short distance of the present works of the upper quarry, from which some slates had been obtained and dressed or prepared for some kind of use. The size of these pits or holes is a point on which the recollection of those witnesses did not enable them to speak; and it was insisted by the

appellant's counsel that they must have been of very small extent; and also (there being at that time no road to the upper quarry), that they must have been worked with a view, either to a mere search or trial of the ground, or to some repairs of buildings or roofs of buildings on the adjoining farm, and not for any purpose of commercial profit. The indistinctness of this evidence (considering the remoteness of the time and the age of the witnesses) is not at all surprising, but it proves what is, in my opinion, sufficient, when considered in connection with the lease of 1811 and the other facts of the case, to determine the question of *onus probandi* as to all that afterward took place adversely to the appellant. It seems to be the most reasonable and probable conclusion that those pits or holes were opened with a view to such workings as those which were at the same time actually going on in the lower quarry, and which were authorized throughout the whole estate by the lease of 1811, although they may have been in some sense experimental, and though farther works, such as roads, were undoubtedly requisite to enable any slates quarried from them to be profitably brought to market. More than this does not appear to me to have been necessary to open, *de facto*, before the lease of 1811 was granted, a quarry, the working of which might lawfully be continued, not by the lessees only, but also by the respondents' predecessor in title, who, on the foreclosure, succeeded to all the rights of the lessor. I agree with the court of appeal in thinking that, under the circumstances of this case, all reasonable presumptions of fact, not inconsistent with what is proved on either side, ought to be made in favor of the lawfulness of what has so long been done.

Upon the questions of law which were argued at the bar, I think it unnecessary to make more than two remarks. The first is, that I am not at present prepared to hold that there can be no such thing as an open mine or quarry, which a tenant for life or other owner of an estate impeachable for waste may work, unless the produce of such mine or quarry has been previously carried to market and sold. No doubt, if a mine or quarry has been worked for commercial profit, that must ordinarily be decisive of the right to continue working; and, on the other hand, if minerals have been worked or used

for some definite and restricted purpose (*e. g.*, for the purpose of fuel or repair to some particular tenements), that would not, alone, give any such right. But if there has been a working and use of minerals not limited to any special or restricted purpose, I find nothing in the older authorities to justify the introduction of sale as a necessary criterion of the difference between a mine or quarry which is, and one which is not, to be considered open in a legal sense. Use, as well as sale, is a perception of profit. None of the *dicta* which are to be found in some of the more modern cases (each of which turned upon its own particular circumstances) can have been intended to introduce a condition or qualification, not previously known, into the law of mines. The other observation which I desire to make is that when a mine or quarry is once open so that the owner of an estate impeachable for waste may work it, I do not consider that the sinking a new pit on the same vein, or breaking ground in a new place on the same rock, is necessarily the opening of a new mine or a new quarry; and for this authority is to be found in the cases which were cited at the bar of *Clavering v. Clavering*, 2 P. W. 388; *Bagot v. Bagot*, (*ante*, 130,) and *Lord Cowley v. Wellesley*, 35 Beav. 635.

LORD GORDON concurred.

Judgment appealed against affirmed, and appeal dismissed with costs.

GAINES ET AL. V. THE GREEN POND IRON MINING
CO. ET AL.

(33 New Jersey Eq. 603. Court of Errors and Appeals, 1881.)

Mines disused. A life tenant may work a mine for his own profit where the owner of the fee in his lifetime opened it, even though he may have discontinued working it for a very long period of years.

Cesser of work distinguished from abandonment. Mere cessation of work though never so long continued will not defeat the tenant's right to work; but an abandonment for a day with an executed intention to devote the land to other uses would be fatal to the claim of the right to work on behalf of the tenant for life.

New pits may be sunk upon veins already opened.

On appeal from a decree of the chancellor reported in *Gaines v. Green Pond Mining Co.*, 32 N. J. Equity, 86.

BARKER GUMMERE, for appellants.

HENRY C. PITNEY, for appellees.

The opinion of the court was delivered by VAN SYCKEL, J.

The bill in this cause was filed by the complainants as owners of the remainder in fee of a large tract of wild lands in the county of Morris, to restrain the defendants, who, it is alleged, have only a life estate in said lands, from cutting timber and working the iron mines on said premises, and also praying for an account.

Two principal questions are raised by the defendants' answer: First, whether Robert L. Graham, through whom the complainants derive their title, was the legitimate son of Charles M. Graham, the third. Second, whether, if Robert's legitimacy is established, the working of the mines by the life tenants, under the circumstances shown in this case, is waste.

The complainants allege that Charles M. Graham was married clandestinely to Cornelia Ludlow in July, 1847, and they admit that it was not followed by open cohabitation. Under such circumstances the law will cast upon the complainants the burden of proving the fact of marriage by very clear and persuasive evidence.

It is not deemed necessary to discuss the testimony on this branch of the case; it is sufficient to say that a careful consideration of it has left no doubt in my mind that the chancellor is justified in the conclusion he reached upon this point.

The complainants, therefore, as owners of the remainder in fee, are entitled to protect their estate against waste by the life tenant or those claiming under her.

The land in question is very rough and mountainous, and almost all of it unfit for cultivation. On it there is a thin covering of wood and timber, with a large deposit of valuable iron ore underlying it. About the year 1812, Dr. Graham, then owner of the fee, excavated the iron ore for the purpose of manufacturing copperas, sulphur being combined with it in such proportions as made it available for that purpose. He made at least two openings, from ten to fifteen feet deep, out of which the ore was raised, and carried on this business for

several years. There was erected upon the premises a building used for pounding the ores, and other apparatus for treating them. There was no digging for ore from the time Dr. Graham quit working (about 1812 or 1814) until about forty years ago, when a small quantity of ore was taken out and tested at two different forges in the neighborhood, and was considered to be without value as iron ore, on account of the sulphur it contained. From that time there has been no mining upon these premises until the Green Pond Iron Company commenced its operations in 1872.

By the strict rule of the common law, the opening and working of a mine by a tenant for years, not opened in the lifetime of the previous tenant in fee, was, equally with the cutting of timber, an undoubted waste of the estate. In *Hoby v. Hoby*, 1 Vern. 218, the widow was held to be dowable of a coal work. It was resolved in *Saunders' Case*, 5 Coke, 12, that if a man hath land in part of which there is a coal mine open, and he leases the land to one for life, or for years, the lessee may dig in it, for inasmuch as the mine is open at the time and he leases all the land, it shall be intended that his intent is as general as his lease."

The tenant for life, subject to waste, can not open a new mine: *Whitfield v. Bewitt*, 2 P. Wms. 242.

And if a lease of land be made, and some mines are open and some are not, the open mines only can be wrought: *Astry v. Ballard*, 2 Leo. 185.

But a tenant for life may open the earth in new places in pursuit of an old vein of coals, when the coal mine had been opened before he came in possession of the estate: *Clavering v. Clavering*, 2 P. Wms. 388.

Stoughton v. Leigh, 1 Taunt. 402, was a case directed out of the high court of chancery for the opinion of the law judges.

The case involved the right of the widow to dower in certain mines on an estate of which her husband had died seized. The mine had been opened and wrought, but had ceased to be worked long prior to the husband's death. The question was, whether the widow, in virtue of her estate in dower, was entitled to work the abandoned mine for her own benefit.

The judges answered that the widow was dowable of all

the mines which had been opened and worked in her husband's lifetime, and "that her right to be endowed of them had no dependence upon the subsequent continuance, or discontinuance of working them, either by the husband in his lifetime, or by those claiming under him since his death."

In *Viner v. Vaughan*, 2 Beav. 466, Lord Langdale said:

"A tenant for life has no right to take the substance of the estate by opening mines or clay-pits, but he has a right to continue the working of mines and clay-pits where the author of the gift has previously done it, and for this reason, that the author of the gift has made them part of the profits of the land."

A temporary injunction was granted, so that the right of the life tenant to work the clay-pits might be passed upon. That this case did not receive a thorough consideration, is shown by the fact that *Stoughton v. Leigh* was not referred to.

This subject was carefully considered by Lord Romilly, in *Bagot v. Bagot*, 32 Beav. 509, where he says:

"With respect to the abandoned, or, as they are called in the pleadings and evidence, the dormant mines, I am of opinion that it has not been shown that he committed waste in working those mines. It is always a question of degree to be established by evidence, whether the working of a mine which has been formerly worked, is waste or not. There is no doubt that a tenant for life, though impeachable for waste, may properly work an open mine. A mine not worked for twelve months, or two years, previously to the tenant for life coming into possession, must still be considered an open mine. A mine which has not been worked for one hundred years can not, I think, be properly so treated. My present opinion is that a mine which had not been worked for twenty or thirty years, from the loss of profit attending the working might, without committing waste, be worked again by a succeeding tenant for life. But, if the working of the mine had been abandoned by the owner of the inheritance many years previously, with a view to some advantage which he considered would accompany such discontinuance, apart from the profits to be made from the sale of the mineral, I doubt whether a succeeding tenant for life could properly treat that as an open mine."

In *Elias v. Griffith*, L. R. (4 App. Cas.) 465, Lord Selborne, says:

"Upon the questions of law which were argued at the bar, I think it unnecessary to make more than two remarks. The first is, that I am not at present prepared to hold that there can be no such thing as an open mine or quarry, which a tenant for life, or other owner of an estate impeachable for waste, may work, unless the produce of such mine or quarry has been previously carried to market and sold. No doubt if a mine or quarry has been worked for commercial profit, that must, ordinarily, be decisive of the right to continue working; and on the other hand, if minerals have been worked or used for some definite and restricted purpose (*e. g.*, for the purpose of fuel or repair to some particular tenements), that would not alone give any such right. But if there has been a working and use of minerals not limited to any special or restricted purpose, I find nothing in the older authorities to justify the introduction of sale as a necessary criterion of the difference between a mine or quarry which is, and one which is not, to be considered open in a legal sense. None of the *dicta*, which are to be found in some of the more modern cases (each of which turned upon its own particular circumstances), can have been intended to introduce a condition or qualification not previously known, into the law of mines.

"The other observation which I desire to make is that where a mine or quarry is once open, so that the owner of an estate impeachable for waste may work it, I do not consider that the sinking a new pit on the same vein, or breaking ground in a new place on the same rock, is necessarily the opening of a new mine or quarry, and for this authority is to be found in the cases which were cited at the bar, of *Clavering v. Clavering*, *Bagot v. Bagot* and *Lord Cowley v. Wellesley*."

In *Elias v. Griffith*, L. R. 8 Ch. Div. 521, Lord Cotton remarked that "To enable a termor or tenant for life punishable for waste, to work mines, it must be shown that the owner of the inheritance, or those acting by his authority, have commenced the working of the mines with a view to making a profit from the working and sale of what is part of the inheritance. When this is established, though no profit has in fact been made, the mine is open in such a sense as to justify the continuance of the working by a termor."

The case of *Clavering v. Clavering* 2 P. Wms. 388, which recognizes the right of the life tenant to open new pits or shafts for the working of an old vein of coal, has never been overruled in the English courts.

These citations show that in England the life tenant has a right to use a mine for his own profit, where the owner of the fee in his lifetime has opened it, even though he may have discontinued working upon it for a long period of years.

The rule by which the right of the life tenant is to be tested is not the length of time that may have elapsed since the last working of the mines, but it depends upon whether the owner of the fee merely discontinued the work for want of capital, or because it did not prove profitable, or for any other like reason, or whether he abandoned it with an executed intention to devote the land to some other use.

A mere cessation of work for however long a period will not defeat the life tenant's right, but an abandonment for a day, with a view, in the language of Lord Romilly, "to some advantage to the property which the fee owner considered would accompany such discontinuance apart from the profits to be made from the sale of the mineral," would extinguish any claim on the part of the life tenant. If the fee owner should sink a shaft and afterward erect a dwelling-house over it, or if he should fill it up and devote the space to agricultural purposes, it would indicate so clearly his intention to devote his estate to other uses than mining that the life tenant could not base any right upon the prior opening.

The distinction between mere cessation of use and such an abandonment as has been adverted to is recognized in the cases in this country.

In the New York Supreme Court a widow was held to be dowerable of a bed of iron ore, although the openings which had been made by the husband had been partly filled up and the work discontinued in his lifetime: *Coates v. Cheever*, 1 Cow. 460.

Chief Justice Shaw, in *Billings v. Taylor*, 10 Pick. 460, expresses the like view:

"Whatever doubts may have been formerly entertained, it seems now to be well settled that a widow is entitled to dower in such mines and quarries as were actually opened and used

during the lifetime of the husband, and it makes no difference whether the husband continued to work them to the period of his death, or whether they have been continued since his death, by the heir or his assignee."

Stoughton v. Leigh, *Coates v. Cheever*, and *Billings v. Taylor*, are cited with approbation by Chancellor Green, in *Reed v. Reed*, 1 C. E. Gr. 248.

The American cases have modified the law of waste, to adapt it to the circumstances of a new and growing country, in order to encourage the tenant for life in making a reasonable use of wild and undeveloped lands: *Hastings v. Crunckleton*, 3 Yeates, 261; *Findlay v. Smith*, 6 Mnnf. 134; *Bullentine v. Poyner*, 2 Hayw. 110; *Neel v. Neel*, 7 Harris, 323; *Irwin v. Covode*, 12 Harris, 162.

In *Neel v. Neel*, a coal mine had been opened and worked for family use and for the benefit of the neighbors, but a very inconsiderable quantity had been taken out. In that case Judge Lowrie said:

"It seems, in this case, that the author of the gift had sometimes sold coal out of the pits, but I do not conceive this to be material. It is sufficient that he opened them and derived any profit from them, even if it were only private. And the decisions refer to coal mines, iron mines, etc., and the tenant for life may work them, even though the working of them may have been discontinued before the death of him through whom the estate comes, and, if necessary to the proper working of them, to make new openings in the ground."

In support of these views he cites the English and American cases, and expresses himself without reference to the statute of 1848.

Chancellor Kent says: "The American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged and better accommodated to the circumstances of a new and growing country:" 4 Comm. 76.

The cases referred to will show a strong inclination to amplify the privileges of the life tenant. In a country like this, where there are such vast bodies of unimproved lands, which would otherwise lie dormant in the hands of the life tenant, public policy requires that the doctrine of waste should be liberalized, and the decisions have uniformly been in that direction.

The present case illustrates the hardship of a close rule in favor of the fee. The life estate vested in 1860, and there is an expectancy of twenty years more of this life. A construction of the law which locks up the land from all beneficial use for so long a period, and gives the life owner only the privilege of paying the land tax, should not be favored.

When the property is unimproved land, not adaptable to any other beneficial use than that of mining, the right of the life tenant to use it reasonably for such purpose, has some support in the adjudications in this country, and is certainly not without reason to uphold it.

To maintain the right of the appellant in this case, it is not necessary to broaden the rule to that extent.

The openings in this case were such as, under the English cases, will establish the right in the life estate to pursue the workings upon the veins which had been opened.

It is sufficient to show that openings were made and ore taken out with a view to profit, and it is wholly immaterial whether the ore was used in the manufacture of copperas, or for some other commercial purpose.

The evidence shows a mere cessation of the work, not such an abandonment, in the legal sense of that term, as will defeat the right of the life tenant. The length of time during which cessation continued is immaterial, so long as the fact of abandonment is not established.

The decree of the chancellor, so far as it denies the right of the appellants to work the veins of ore upon which the openings had been made in the lifetime of the owner of the fee, and so far as it enjoins such work, should be reversed, and in other respects affirmed.

Decree unanimously reversed.

1. Lessee for lives renewable forever restrained from committing waste on the tenement: *Purcell v. Nash*, 1 Jones, 626; 2 Jones, 116.

2. Mortgagee in possession opening mines: *Millete v. Divey*, 31 Beav. 470.

3. Action for waste by tenant in common against co-tenant: *Smith v. Sharpe*, Busbee's Law (N. C.), 91.

4. It is not waste for the lessee of lands "with the mines," etc., to open a new mine: *Darcy v. Askwith*, Hob. 234, Hutt. 19; *Owings v. Emery*, 8 M. R. 357.

5. Tenants for life allowed to make unlimited use of salt mines during term: *Findlay v. Smith*, 13 M. R. 182.

6. Waste in quarrying stone will not be enjoined unless the injury is shown to be irreparable: *Hamilton v. Ely*, 4 Gill (Md.), 34.

7. Wasting substance of the estate enjoined: *Irwin v. Davidson*, 7 M. R. 237. (See INJUNCTION.)

8. The court will not grant an injunction to stay waste in digging mines till the answer is come in, or the defendant has made default: *Lowther v. Stamper*, 3 Atk. 496.

9. An account for waste is incident to relief by injunction: *Ackerman v. Hartley*, 1 M. R. 74.

10. A charge of waste (diminution of value of mortgaged property) is ground for injunction: *Capner v. Flemington Co.*, 7 M. R. 263.

11. Mining in itself is not waste: *Id.*; *Heil v. Strong*, 44 Pa. St. 264.

12. A statutory provision allowing continued use of the premises for the purpose for which used before the mortgage, may be waived: *Edwards v. Woodbury*, 1 McCrary, 429.

13. An action to stay waste will lie in favor of an equitable owner: *Gillett v. Treganza*, 7. M. R. 432.

14. Action on the case against lessee of mine for injury to the reversion: *Marker v. Kenrick*, 2 M. R. 98. In form of covenant for same: *Easterby v. Sampson*, 6 Bing. 644; 9 B. & C. 505.

ARKWRIGHT ET AL. V. GELL ET AL.

(5 Mees. & Welsb. 203; Blanchard & Weeks' Leading Cases, 816. Court of Exchequer, 1839.)

Artificial water-course—User. In the case of an artificial water-course, made for a particular and temporary purpose, its water having been originally taken with notice that it might be discontinued, and the circumstances not being such as to afford any presumption of a grant by the owners of certain mines, the lessee of the owner of the land through which the water-course was made was held not to have acquired by user any perpetual right to the uninterrupted continuance of the water-course.

This was an action tried at the Derby Spring Assizes 1838 before Parke, J., when a verdict was found for the plaintiffs, subject to the opinion of the court upon the following special case; the court to draw the same inferences from the facts as the jury might.

The declaration contained two counts which in substance charged the defendants with diverting from certain cotton mills of the plaintiffs the water to which the plaintiffs claimed a right and which had usually flowed to and been used for the purposes of the said mills.

The defendants pleaded not guilty, and other pleas denying the right of the plaintiffs to the water and the Statute of Limitations. Upon all these pleas issues were joined.

Sir W. W. FOLLET, for the plaintiffs.

ERLE, for the defendants.

At the Easter term, 1839, the judgment of the court was delivered by PARKE, B.

The plaintiffs in this case are the occupiers of certain cotton-mills, at Cromford, in the county of Derby, and complain of an illegal diversion, by the defendants, of the water to which they were of right entitled for the supply of their mills. The defendants by their pleas deny that right, and also insist that they have not been guilty of any illegal diversion. A special case was reserved, on the trial, for the opinion of

the court, stating a great number of documents and facts, upon which the court are not merely to give their judgment on matters of law, but to take the office of the jury, by determining whether any and what inferences of fact ought to be drawn from the facts stated. This course leads to one great inconvenience, as it tends to confound the rule of law with an inference of fact only, which inference might have been varied by a very slight circumstance.

From the facts and documents, however, the case appears to be this: In the beginning of the last century, certain adventurers had in part constructed, and were proceeding to continue, a sough, now called the Cromford Sough, for the purpose of draining a portion of the mineral field, in the Wapentake of Wirksworth. How they acquired the right to make that sough is not stated; it was, however, without doubt, either by virtue of the custom of mining there prevalent, or by the express license of the owner of the soil through which it was made. The adventurers received their remuneration in the shape of a certain portion of the ore raised from the mines, within the level lying near and benefited by the sough, (technically called within the title of the sough) in consequence of an agreement with the proprietors of the mines. The right to this easement, with its accompanying advantages, appears to have been the subject of sale and conveyance in that district; for, in 1738, the proprietors leased it for 999 years for a pecuniary consideration, with a reservation, by way of rent, of a part of the profits. Mr. Arkwright, under whom the plaintiffs claim, and all whose rights they may be assumed to have had, by demise from him, when the cause of action accrued, became, in 1836, the purchaser of the reversion, expectant on the determination of that lease; and he also acquired a portion of the interest of the lessees, by a conveyance from some of them. It does not appear to us that this circumstance affects the question between the parties to this suit.

After the sough had been constructed, and a constant flow of water thereby conducted from the mines, the late Sir Richard Arkwright, the father of Mr. Arkwright, obtained, in the year 1771, a lease for eighty-four years from the lord of the manor of Cromford (who, upon the special case, is al-

leged to have been the owner of the land through which the Cromford Sough was made, and also the owner of a piece of land between the mouth of the sough and the brook into which the water was conveyed) of that piece of land, the brook, and the "stream of water issuing and coming from Cromford Sough," with the right of erecting mills on the piece of land. In 1772, Sir Richard Arkwright erected extensive cotton-mills thereon; and in April, 1789, he purchased that land, and the fee-simple in the mills and the manor of Cromford, including the lands through which the Cromford Sough was made.

In the meantime, another company of adventurers had begun to construct another mining sough, called the Meer Brook Sough, on a much lower level, in the adjoining township of Wirksworth. The defendants represent and have all the rights of that company of adventurers; and must, like the proprietors of the Cromford Sough, be assumed to have acted, either by virtue of a mining custom, or by express license of the owner of the soil, confirmed by the Cromford Inclosure Act in 1802; and also to have had the authority, prior or subsequent, of the owners of the mines drained by that sough, and contributing a certain portion of the ore by way of recompense. These facts are not distinctly found, but we think we must infer that such was the case; and consequently that the defendants stand in the same relation to the plaintiffs as if the owners of those mines had themselves, with the consent of the owner of the soil, constructed the sough for the purpose of freeing their mines from water; for whether they make the sough themselves, or through the agency of the adventurers, is immaterial. In 1813, the defendants, being themselves proprietors of mines drained by it, extended the Meer Brook Sough, having made an agreement with the then proprietors of the Cromford Sough, and of other mines unwatered by it, and which appear to have been then worked down to the level of that sough, for the purpose of regulating their respective rights; and the recompense to be paid by the latter to the former set of adventurers for the benefit to be derived by them by the extension of this sough, and the unwatering, by means of it, of a further portion of their mineral field below the level of the former sough.

The new sough was, therefore, constructed by the consent of some, if not all, of those mine owners who had formerly used the Cromford Sough, and in part for their benefit; and this circumstance places the defendants in the same position, in respect to the diversion of the surplus water, as if they themselves had been owners of part of the mineral field formerly drained by the Cromford Sough, and were now proceeding to unwater a further portion of the same field by means of the new sough. When the Meer Brook Sough was thus extended, the water was found to flow into it, and flood-gates were constructed at the end, the closing of which prevented the water from finding its way in that direction, but which, when opened, let off the water, which would otherwise have been discharged by the Cromford Sough, and thereby prevented it from flowing to the plaintiffs' mill.

In 1825, an arrangement was made for the mutual accommodation of Mr. Arkwright and the Meer Brook Sough proprietors, which was not to affect their rights; and which, having been determined in 1836, left them in the same situation as if it had never been made; and the gates being removed, in order to carry the sough further in that direction, and the water thereby diverted from the plaintiffs' mills, the defendants are in the same situation as if no flood-gates had been made, and as if in the construction of their sough, for the purpose of draining another portion of the mineral field, they had broken the natural barrier which pent the water up and made it flow through the Cromford Sough, and so caused the water to pass out at a lower level through the Meer Brook Sough. And the question is, whether the defendants, by so doing, are rendered liable to an action at the suit of the plaintiffs. This question, which was most elaborately and ably argued during the last term, appears to us, strictly speaking, to be one as much of fact as of law, and when the situation of both parties is fully understood, does not appear to us to be one of much doubt or difficulty.

The stream upon which the mills were constructed was not a natural water-course, to the advantage of which, flowing in its natural course, the possessor of the land adjoining would be entitled, according to the doctrine laid down in *Mason v. Hill*, 5 B. & Ad. 1, and in other cases. This was an artificial

water-course, and the sole object for which it was made was to get rid of a nuisance to the mines, and to enable their proprietors to get the ores which lay within the mineral field drained by it; and the flow of water through that channel was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine-owners required it, and in the ordinary course it would most probably cease when the mineral ore above its level should have been exhausted.

That Sir Richard Arkwright contemplated the discontinuance of this water-course, (if the question of his knowledge in this state of things can be material) there is evidence in the lease made in 1771, which contains a provision for a supply from the river, in the event of the stream being lessened or taken away, by the construction of another sough; and also that such an event was not improbable, appears from the clause in the second Cromford Canal Act, 30 Geo. III, Chap. 56, Sec. 4. What then is the species of right or interest which the proprietor of the surface where the stream issued forth, or his grantees, would have in such a water-course, at common law and independently of the effect of user under the recent statute, 2 and 3 Will. IV., Chap. 71? He would only have a right to use it, for any purpose to which it was applicable, so long as it continued there. An user for twenty years, or a longer time, would afford no presumption of a grant of the right to the water in perpetuity; for such a grant would, in truth, be neither more nor less than an obligation on the mine owner not to work his mines by the ordinary mode of getting minerals, below the level drained by that sough, and to keep the mines flooded up to that level, in order to make the flow of water constant for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine owners could have meant to burden themselves with such a servitude, so destructive to their interests; and what is there to raise an inference of such an intention? The mine owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favor of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower

level and thus taking away the water entirely—a course so expensive and inconvenient that it would be very unreasonable, and a very improper extension of the principle applied to the case of lights, to infer, from the abstinence from such an act, an intention to grant the use of the water in perpetuity as a matter of right.

Several instances were put, in the course of the argument, of cases analogous to the present, in which it could not be contended for a moment that any right was acquired. A steam-engine is used by the owner of a mine to drain it, and the water pumped up flows in a channel to the estate of the adjoining land owner, and is there used for agricultural purposes for twenty years. Is it possible, from the fact of such a user, to presume a grant by the owner of the steam-engine of the right to the water in perpetuity, so as to burden himself and the assigns of his mine with the obligation to keep a steam-engine forever, for the benefit of the land owner? Or, if the water from the spout of the eaves of a row of houses was to flow into an adjoining yard, and be there used for twenty years by its occupiers for domestic purposes, could it be successfully contended that the owners of the houses had contracted an obligation not to alter their construction so as to impair the flow of water? Clearly not. In all, the nature of the case distinctly shows that no right is acquired as against the owner of the property from which the course of water takes its origin; though, as between the first and any subsequent appropriator of the water-course itself, such a right may be acquired. And so, in the present case, Sir Richard Arkwright, by the grant from the owner of the surface for eighty-four years, acquired a right to use the stream as against him; and if there had been no grant, he would, by twenty years, user, have acquired the like right as against such owner. But the user, even for a much longer period, whilst the flow of water was going on for the convenience of the mines, would afford no presumption of a grant at common law as against the owners of the mines.

It remains to be considered whether the statute 2 and 3 Will. IV, Chap 71, gives to Mr. Arkwright, and those who claim under him, any such right; and we are clearly of opinion that it does not. The whole purview of the act shows that it

applies only to such rights as would, before the act, have been acquired by the presumption of a grant, from long user. The act expressly requires enjoyment for different periods, "*without interruption*," and, therefore, necessarily imports such an user as could be *interrupted* by some one "capable of resisting the claim;" and it also requires it to be "of right." But the use of the water in this case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the Cromford Sough, and was incapable of interruption by them, at any time during the whole period, by any reasonable mode, and as against them it was not "of right." They had no interest to prevent it, and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water, so long as their mines were freed from it.

We, therefore, think that the plaintiffs never acquired any right to have the stream of water continued in its former channel, either by the presumption of a grant or by the recent statute, as against the owners of the lower level of the mineral field, or the defendants acting by their authority, and, therefore, our judgment must be for the defendants.

Judgment for the defendants.

ACTON V. BLUNDELL ET AL.

(12 Meeson & Welsby, 324; B. & W. Leading Cases, 758. Exchequer Chamber, 1843.)

Subterraneous stream—No action against mine draining well. ¹The owner of land through which water flows in a subterraneous course has no right or interest in it which will enable him to maintain an action against a land owner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry.

Quære, if the well had been ancient, whether there would have been any difference?

Action on the case. The facts are stated in the opinion of the court.

¹ *Chasemore v. Richards*, 7 H. L. Cases, 349; *Wheatley v. Daugh*, 13 M. R. 374.

COWLING, for the plaintiff.

ADDISON, for defendants.

The judgment of the court was delivered by TINDAL, C. J.

The question raised before us on this bill of exceptions is one of equal novelty and importance. The plaintiff below, who is also the plaintiff in error, in his action on the case declared in the first count for the disturbance of his right to the water of certain *underground springs, streams and water-courses*, which, as he alleged, ought of right to run, flow and percolate into the closes of the plaintiff, for supplying certain mills with water; and in the second count for the draining off the water of a certain *spring or well of water* in a certain close of the plaintiff, by reason of the possession of which close, as he alleged, he ought of right to have the use, benefit and enjoyment of the water of the said *spring or well* for the convenient use of his close. The defendants, by their pleas, traversed the rights in the manner alleged in those counts respectively. At the trial the plaintiff proved that, within twenty years before the commencement of the suit, viz., in the latter end of 1821, a former owner and occupier of certain land and a cotton-mill, now belonging to the plaintiff, had sunk and made in such land a well for raising water for the working of the mill; and that the defendants, in the year 1837, had sunk a coal-pit in the land of one of the defendants, at about three-quarters of a mile from the plaintiff's well, and about three years after, sunk a second, at a somewhat less distance; the consequence of which sinking was that by the first the supply of water was considerably diminished, and by the second was rendered altogether insufficient for the purposes of the mill. The learned judge before whom the cause was tried directed the jury that if the defendants had proceeded and acted in the usual and proper manner on the land, for the purpose of working and winning a coal-mine therein, they might lawfully do so, and that the plaintiff's evidence was not sufficient to support the allegations in his declaration as traversed by the second and third pleas. Against this direction of the judge the counsel for the plaintiff tendered the bill of exceptions, which has been argued before us. And after hearing such argument and consideration of the case, we

are of opinion that the direction of the learned judge was correct in point of law.

The question argued before us has been in substance this: Whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to and regulates a water-course flowing on the surface.

The rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established: each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above or below; so that neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the license or the grant of the proprietor above. The law is laid down in those precise terms by the Court of King's Bench in the case of *Mason v. Hill*, 5 B. & Ad. 1, 2 Nev. & M. 747, and substantially is declared by the vice-chancellor in the case of *Wright v. Howard*, 1 S. & S. 190, and such we consider a correct exposition of the law. And if the right to the enjoyment of underground springs, or to a well supplied thereby, is to be governed by the same law, then undoubtedly the defendants could not justify the sinking of the coal-pits, and the direction given by the learned judge would be wrong.

But we think, on considering the grounds and origin of the law which is held to govern running streams, the consequences which would result if the same law is made applicable to springs beneath the surface, and, lastly, the authorities to be found in the books, so far as any inference can be drawn from them bearing on the point now under discussion, that there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law.

The ground and origin of the law which governs streams running in their natural course would seem to be this: That the right enjoyed by the several proprietors of the lands over

which they flow is and always has been, public and notorious ; that the enjoyment has been long continued—in ordinary cases, indeed, time out of mind—and uninterrupted ; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or perhaps it may be considered as a rule of positive law, (which would seem to be the opinion of Fleta and of Blackstone) the origin of which is lost by the progress of time ; or it may not be unfitly treated, as laid down by Mr. Justice Story, in his judgment in the case of *Tyler v. Wilkinson*, in the courts of the United States, (4 Mason's Am. Rep. 401) as "an incident to the land ; and that whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law." But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighboring soil does not flow openly in the sight of the neighboring proprietor, but through the hidden veins of the earth beneath its surface ; no man can tell what changes these underground sources have undergone in the progress of time ; it may well be that it is only yesterday's date that they first took the course and direction which enabled them to supply the well. Again, no proprietor knows what portion of water is taken from beneath his own soil ; how much he gives originally, or how much he transmits only, or how much he receives ; on the contrary, until the well is sunk, and the water collected by draining into it, there can not properly be said, with reference to the well, to be any flow of water at all. In the case, therefore, of the well, there can be no ground for implying any mutual consent or agreement, for ages past, between the owners of the several lands beneath which the underground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built ; nor for the same reason, can any trace of a positive law be inferred from long-continued acquiescence and submission, whilst the very existence of the underground springs or of the well may be unknown to the proprietors of the soil.

But the difference between the two cases with respect to the consequences, if the same law is to be applied to both, is still more apparent. In the case of the running stream, the owner of the soil merely transmits the water over its surface; he receives as much from his higher neighbor as he sends down to his neighbor below; he is neither better nor worse; the level of the water remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil; and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbor, he may impose on such neighbor the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of mining, and discovers, when too late, that the appropriation of the water has already been made. Further, the advantage on one side and the detriment to the other may bear no proportion. The well may be sunk to supply a cottage or a drinking place for cattle; whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined. In the present case, the nearest coal-pit is at the distance of half a mile from the well. It is obvious the law must equally apply if there is an interval of many miles.

Considering, therefore, the state of circumstances upon which the law is grounded in the one case to be entirely dissimilar from those which exist in the other, and that the application of the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust, we feel ourselves warranted in holding, upon principle, that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith.

No case has been cited on either side bearing directly on

the subject in dispute. The case of *Cooper v. Barber*, 5 Taunt. 99, which approaches the nearest to it, seems to make against the proposition contended for by the plaintiff. In that case the defendant had for many years penned back a stream for the purpose of irrigation, in consequence of which the water had percolated through a porous and gravelly soil into the plaintiff's land; but as this percolation had been insensible and unknown by the plaintiff until the land was applied for building purposes, the court held that the defendant had gained no right thereby, so as to justify its continuance. The case of *Partridge v. Scott*, 3 M. & W. 230, is an authority to show that a man, by building a house on the extremity of his own land, does not thereby acquire any right of easement, for support or otherwise, over the adjoining land of his neighbor. It is said, in that case, "he has no right to load his own soil so as to make it require the support of that of his neighbor unless he has some grant to that effect." It must follow, by parity of reason, that if he digs a well in his own land so close to the soil of his neighbor as to require the support of a rib of clay or of stone in his neighbor's land to retain the water in the well, no action would lie against the owner of the adjacent land for digging away such clay or stone, which is his own property, and thereby letting out the water. And it would seem to make no difference as to the legal rights of the parties if the well stands some distance within the plaintiff's boundary, and the digging by the defendant, which occasions the water to flow from the well, is some distance within the defendant's boundary, which is, in substance, the very case before us.

The Roman law forms no rule, binding in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe.

The authority of one at least of the learned Roman lawyers appears decisive upon the point in favor of the defendants; of some others the opinion is expressed with more obscurity.

In the Digest, Lib. 39, Tit. 3, *De æqua et aquæ pluvias arcandæ*. Sec. 12, "*Denique Marcellus scribit: Cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi: nec de dolo actionem, et sane non debet habere; si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit.*"

It is scarcely necessary to say that we intimate no opinion whatever as to what might be the rule of law if there had been an uninterrupted user of the right for more than the last twenty years; but, confining ourselves strictly to the facts stated in the bill of exceptions, we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which can not become the ground of an action.

We think, therefore, the direction given by the learned judge at the trial was correct, and that the judgment already given for the defendants in the court below must be affirmed.

Judgment affirmed.

EDDY ET AL. V. SIMPSON ET AL.

(3 California, 249. Supreme Court, 1853.)

¹ **Right to reclaim escaped water.** Plaintiffs had dammed and appropriated the waters of Shady Creek. Afterward defendants constructed a ditch by which the waters of Grizzly Cañon and Bloody Run were diverted to a point where they utilized it for mining. After using, it was allowed to find its way into Shady Creek above the plaintiffs' dam. Defendants claimed the right to tap Shady Creek above plaintiffs' dam and re-take as much water as escaped from their works: *Held*, that they had lost all right to the escaped water and could not reclaim it, and that the enjoyment of the right, if conceded, would be impracticable.

Usufruct in water. The right to water is usufructuary; is not in the *corpus* of the water, and continues only during possession.

Appeal from the Tenth Judicial District.

This action was brought to recover damages for interfering with the water right of the plaintiffs. The plaintiffs had prior occupancy of the waters of Shady Creek, by means of a dam and ditch constructed by them, and used the same for mining purposes. The defendants, by like means, obtained the use, for like purposes, of other neighboring streams, and after using the water thereof, it flowed by natural channels into Shady Creek above plaintiffs' dam. Defendants then built a dam above plaintiffs' dam on Shady Creek, and withdrew a portion thereof from plaintiffs' works, so as to leave them deficient in supply, and at times without water, for their purposes. The defense was based upon the fact, that defendants having by their works added to the quantity of water in Shady Creek, that they had a right to withdraw a like quantity for their own use; and this was the question at issue. The

¹ The rule applied in this case is not strictly consistent with the other and later decisions as to the appropriation of water, unless it be in fact true that the attempted re-clamation of the water would be impracticable, having regard to the prior rights of others, or unless it be placed upon the ground that the allowing of the water to escape was an abandonment thereof. See the case commented on in *Butte Co. v. Vaughn*, 4 M. R. 556. It is also cited in *Kelly v. Natoma Co.*, 1 M. R. 592; *Nevada Co. v. Kidd*, 37 Cal. 310; *McDonald v. Askew*, 1 M. R. 660; *Hoffman v. Stone*, 4 M. R. 520.

facts will be found very clearly stated in the opinion of the court.

The district court charged the jury as follows:

"As a general principle, the party who first uses the water of a stream, is by virtue of priority of occupation entitled to hold the same. If a company or association of miners construct a ditch, to convey water from a running stream for mining or other purposes, and they are the first to use the water, locate and construct the ditch, they are legally entitled to the same as their property, to the extent of the capacity of the ditch to hold and convey water. For, if it appears that there is more water running in the stream than the ditch of the first party can hold and convey, then any other party may rightfully take and use the surplus, and it does not matter whether the excess of water be taken from a point above or below the dam of the first party.

"In the case before the court, the plaintiffs are clearly entitled to as much water as they originally had in Shady Creek, but no more, and if the defendants, by constructing a ditch and dam at a point farther up the stream, convey water therefrom, so as to diminish the quantity first used by the plaintiffs, then they are liable to them for damages. If the defendants, by means of their ditch from 'Grizzly Canyon' and 'Bloody Run' conveyed into Shady Creek as much water as they afterward took from it, by their second ditch, then plaintiffs can not be damaged.

"The doctrine of confusion or mixing of property does not apply. If defendants' ditch had conveyed the water into the ditch of the plaintiffs, then no doubt plaintiffs could have claimed the whole; but it emptied into Shady Creek a considerable distance above the plaintiffs' dam; and the point at which the second ditch takes off the water is still above the plaintiffs' dam, and in the natural channel of Shady Creek."

———, for appellants.

Rowe and Dunn, for respondents.

WELLS, Justice, delivered the opinion of the court. HEYDENFELDT, Justice, concurred.

From the record in this case, it appears that the plaintiffs constructed a dam across a stream called Shady Creek to French Corral, where the water was used by plaintiffs for mining purposes.

After the construction of plaintiffs' work, and plaintiffs had been for a considerable time in possession of and using the waters of Shady Creek, the defendants constructed a work of a similar nature, whereby they brought water from Grizzly Canyon and Bloody Run, to a place known as Cherokee Corral, where the water from defendants' ditch was used for mining purposes. The water thus used by defendants at Cherokee Corral, from that point found its way, by natural channels and by the natural level of the country, into the waters of Shady Creek, above the dam of plaintiffs.

The defendants subsequently constructed a dam above the plaintiffs' dam, ran a ditch to French Corral, and diverted a portion of the waters of Shady Creek, so that at times no water descended to plaintiffs' works, the entire quantity being used by defendants' ditch above.

The point made by the defense, on the trial of the cause below, was, that by the act of the defendants the waters of Grizzly Canyon and Bloody Run, were caused to flow into Shady Creek; that, therefore, the defendants had a right to construct a dam and ditch above plaintiffs, and carry off the same quantity of water from Shady Creek, that flowed from defendants' ditch at Cherokee Corral.

This defense is set up substantially in the answer of defendants, and the court below held, that defendants had an exclusive right to the water which they had caused to flow into Shady Creek, and could withdraw the same. The instruction refused and the charge given by the court, both assume this right in the defendants.

In considering the question presented, it is to be observed that the foundation of the plaintiffs' right was their first possession. Of all the waters running into Shady Creek, they were in the possession and use until defendants constructed their ditch above them, running to French Corral. There is no pretense of right in the defendants to carry off water from Shady Creek, except a claim of property in the water from Cherokee Corral.

It is laid down by our law writers, that the right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use.

The owner of land through which a stream flows, merely transmits the water over its surface, having the right to its reasonable use during its passage. The right is not in the *corpus* of the water, and only continues with its possession: Angell on Water Courses, p. 86. A party can not reclaim water that he has lost: 2 Black. Com. p. 18. When the water of Grizzly Canyon and Bloody Run left the possession of the defendants at Cherokee Corral, all right to, and interest in, that water was lost by the defendants. It might be made the property of whomsoever chose to possess it. Without the agency of the defendants, it found its way into Shady Creek joining the waters then in the possession of the plaintiffs, and became a part of the body of water used and possessed by them.

As defendants had lost all right in the water, they could have no right to withdraw it from the possession of the plaintiffs. The rule laid down by the court below, while it is a departure from all the rules governing this description of property, would be impracticable in its application, and we think it much safer to adhere to known principles and well settled law, so far as they can be made applicable to the novel questions growing out of the peculiar enterprises in which many of the people of this State are embarked.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

IRWIN, Respondent, v. PHILLIPS ET AL., Appellant.

(5 California, 140; B. & W. L. C. 727. Supreme Court, 1855.)

The political and social condition of a country are matters for the judicial cognizance of its courts.

The right to divert water from its natural streams has been recognized by the State legislation of California, and by the tacit assent of the Federal Government.

Claim subject to prior vested water rights. The right to divert water and the right to work the mines on the public domain standing upon equal footing, the doctrine of prior appropriation must decide in cases of conflict; and a mining claim must suffer the loss of water needed to work it when such water has been diverted prior to the location of such mining claim.

Appeal from the District Court of the Tenth Judicial District, Nevada County.

The material facts of the case are contained in the opinion of the court.

At the trial, the jury found that the possession of the plaintiff was anterior to that of the defendants, and under instructions from the court, found for the plaintiff.

Defendants' counsel excepted to the ruling of the court, and from the final judgment entered in the cause, appealed.

DUNN & MARSHALL, for appellants.

JO. G. BALDWIN and ALEX. ANDERSON, for respondent.

HEYDENFELDT, J., delivered the opinion of the court. MURRAY, C. J., concurred.

The several assignments of error will not be separately considered, because the whole merits of the case depend really on a single question, and upon that question the case must be decided. The proposition to be settled is whether the owner of a canal in the mineral region of this State, constructed for the purpose of supplying water to miners, has the right to divert the water of a stream from its natural channel, as against the claims of those who, subsequent to the diversion, take up lands along the banks of the stream, for the purpose of mining. It must be premised that it is admitted on all sides that the mining claims in controversy, and the lands through which the stream runs and through which the canal passes, are a part of the public domain, to which there is no claim of private proprietorship; and that the miners have the right to dig for gold on the public lands was settled by this court in the case of *Hicks v. Bell*, 3 Cal. 219.

It is insisted by the appellants that in this case the common

law doctrine must be invoked, which prescribes that a water course must be allowed to flow in its natural channel. But upon an examination of the authorities which support that doctrine, it will be found to rest upon the fact of the individual rights of landed proprietors upon the stream, the principle being both at the civil and common law that the owner of lands on the banks of a water-course owns to the middle of the stream, and has the right in virtue of his proprietorship to the use of the water in its pure and natural condition. In this case the lands are the property either of the State or of the United States, and it is not necessary to decide to which they belong for the purposes of this case. It is certain that at the common law the diversion of water-courses could only be complained of by riparian owners, who were deprived of the use, or those claiming directly under them. Can the appellants assert their present claim as tenants at will? To solve this question it must be kept in mind that their tenancy is of their own creation, their tenements of their own selection, and subsequent, in point of time, to the diversion of the stream. They had the right to mine where they pleased throughout an extensive region, and they selected the bank of a stream from which the water had been already turned, for the purpose of supplying the mines at another point.

Courts are bound to take notice of the political and social condition of the country which they judicially rule. In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown, either by the United States or the State governments, and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and

effect of *res judicata*. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law makers; as for instance, in the Revenue Act "canals and water races" are declared to be property subject to taxation, and this when there was none other in the State than such as were devoted to the use of mining. Section 2, of Article IX of the same act, providing for the assessment of the property of companies and associations, among others mentions "dam or dams, canal or canals, or other works for mining purposes." This simply goes to prove what is the purpose of the argument, that however much the policy of the State, as indicated by her legislation, has conferred the privilege to work the mines, it has equally conferred the right to divert the streams from their natural channels, and as these two rights stand upon an equal footing, when they conflict they must be decided by the fact of priority, upon the maxim of equity, *qui prior est in tempore, potior est in jure*. The miner who selects a piece of ground to work, must take it as he finds it, subject to prior rights, which have an equal equity on account of an equal recognition from the sovereign power. If it is upon a stream, the waters of which have not been taken from their bed, they can not be taken to his prejudice; but if they have been already diverted, and for as high and legitimate a purpose as the one he seeks to accomplish, he has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection.

It follows from this opinion that the judgment of the court below was substantially correct, upon the merits of the case presented by the evidence, and it is therefore affirmed.

ELLIS V. DUNCAN ET AL.

(21 Barb. 230. Supreme Court of New York, 1855.)

Spring drained by quarry. The owner of a farm may dig a ditch to drain his land, or open and work a quarry upon it, although by so doing, he intercepts one of the underground sources of a spring on his neighbor's land, which supplies a small stream of water flowing partly through the land of each, and thereby diminishes the natural supply of water, to the injury of the adjoining proprietor.

Idem—Damnum absque injuria. The rule that a man has a right to the free and absolute use of his property, so long as he does not directly invade that of his neighbor, or consequentially injure his perceptible and clearly defined rights, is applicable to the interruption of the sub-surface supplies of a stream, by the owner of the soil, and the damage resulting from such an interruption is not the subject of legal redress.

Motion to dissolve a preliminary injunction. The action was brought to restrain the defendants from digging ditches upon their land, or opening and working a stone or marble quarry thereon, so as to intercept or cut off the underground sources of a spring existing upon the plaintiff's land adjoining the farm of the defendant, which supplied a small stream of water, flowing partly through the land of each party. It was alleged in the affidavits read by the defendants on the motion, that the defendants purchased the farm adjoining the plaintiff's land, with the intent of improving the same as a permanent residence. That finding a portion of said farm wet and springy, they caused drains and ditches to be dug and opened therein, for the purpose of rendering the same fit for cultivation, and also to draw the water from said springy ground into a reservoir, from whence their dwelling house was to be supplied. That the brook in question had always furnished a copious supply of water, at all seasons of the year, until a few years ago, when a considerable part of the water of the spring was diverted from the brook by one White, the grantor of the plaintiff, who blasted out, with powder, a quantity of stone from said spring, which caused the same to fail; and compelled him to excavate more stone therefrom; after which he inserted a lead pipe, and drained a large quantity of water thereby to the dwelling house now occupied by the plaintiff, since which the brook had failed in dry weather. It was further stated in the affidavits, that the defendants having ascertained that a

valuable quarry of building stone, or marble, existed upon the said land, they made arrangements to open the same, for the purpose of taking stone therefrom to construct a dwelling house, that they had made contracts for the erection of their proposed dwelling house, and were excavating the marble for the purpose of using the same in the construction of said dwelling house, when the injunction was served upon them. The defendants claimed the right to dig the said drains and ditches, and make the said excavations, for the purposes aforesaid.

C. W. SANDFORD, for the defendants.

A. L. JORDAN, for the plaintiff.

By the Court, S. B. STRONG,

The question involved in this controversy is whether the owner of a farm may dig a ditch to drain his land, or open and work a quarry upon it, when by so doing he intercepts one of the underground sources of a spring on his neighbor's land, which supplies a small stream of water flowing partly through the land of each, and thereby diminish the natural supply of water to the injury of the adjoining proprietor. There can be no doubt of the correctness of the injunction *sic utere tuo ut alienum non lædas*; but I have frequently had occasion to remark that it refers to such injuries only as the law will redress, and not to the large class which are usually denominated *damnum absque injuria*. Of the latter class are such as result immediately to one by the lawful exercise of the rights of another. To award compensation for or prevent the infliction of such injuries would seriously arrest the march of improvement, and often so seriously impair the use of property as to render it of little or no value. The distinction between reasonable and unreasonable damages, in cases of this description, is not very definite or clear. In some particulars the rule has been solemnly settled by uniform decisions, while in others, and generally such as are very near the dividing line, the determinations have been conflicting, and in many there have been none at all. The distinction turns generally, although not universally, upon the question whether the damages are direct or consequential. In the latter case,

and especially where they result remotely from the exciting cause, they are not generally recoverable. In the interruption of a surface current, the injury from a diminution of the water would seem to be palpable, and so far direct that it would originate a valid cause of action. There, too, the owners have knowingly permitted the waters to flow in their natural course for the benefit of all those whose banks they pass, from time immemorial. They have acquired their title with a full knowledge of what is visible, and (presumptively) of the rights which result from it. But it is different when the principal stream is partially supplied by underground currents. The owners of the surface soil are not generally aware of their existence, and can not be supposed to have voluntarily acquiesced in any appropriation of them. When they purchase they are ignorant of any obstacle to the free use of their property *ab center ad cœlum*, and to arrest some valuable improvement, such as digging a well or cellar, draining the land, taking valuable stones from a quarry, or leveling the ground for building or agricultural purposes, because it would cause some consequential, unforeseen and possibly irremediable damage to another, would seem to be unreasonable and unjust. If the principle that the man who interrupts a sub-surface stream, to the prejudice of his neighbor, commits a wrong for which the law will give redress, is sound, no one will be safe in purchasing land adjoining or near a private stream of water, as he may be restrained forever from making some valuable, and frequently from the progressiveness of the age, necessary improvements.

It seems to me that the rule that a man has the right to the free and absolute use of his property, so long as he does not directly invade that of his neighbor, or consequentially injure his perceptible and clearly defined rights, is applicable to the interruption of the sub-surface supplies of a stream by the owner of the soil; and that the damage resulting from it is not the subject of legal redress. The case of *Acton v. Blundell*, 12 M. & W. 324, sustains that principle; and the case is cited with approbation by Ch. J. Bronson, in giving the unanimous opinion of the court of appeals in *Radcliff v. Mayor of Brooklyn*, 4 N. Y. 200. The injury of which Mr. Radcliff's executors complained, in that case, was much greater

than any which can result to the plaintiff in this action from the supposed wrong committed by the defendants. And although the facts were somewhat dissimilar, yet the principle which I have been considering is alike applicable to both.

If the injury of which the plaintiff complains had been actionable, I should much doubt the propriety of granting an injunction, unless it had been of a much more serious character than what appears from the papers presented to us. If an injunction should be proper it must be perpetual, or, at any rate, endure as long as the water continues to run. The plaintiff might, in order to prevent an immediate damage to himself, interrupt and prevent improvements of real importance to the defendants, or those who may succeed them. A recovery of damages in an ordinary action would be a much more reasonable remedy. And the plaintiff may resort to that, notwithstanding the decision of this appeal.

The order granting a preliminary injunction must be reversed, with \$10 costs, and the injunction must be dissolved.

PHOENIX WATER CO. V. FLETCHER ET AL.

(23 California, 482. Supreme Court, 1863.)

Rights of prior appropriator of water. The prior appropriator of a stream of water for mining purposes has a right to have the water flow down above the point of his appropriation without interruption or diminution in quantity.

Irregular flow caused by hydraulics. One who enters upon a stream of water above the prior appropriator and erects hydraulic works, must so construct them as not to impede the regularity of the flow of the water, if its irregular flow would injure the first appropriator.

¹ Injury to prior appropriator, when not actionable. A mere temporary or trivial irregularity in the flow of the water, such as does not cause actual injury to the prior appropriator below, will not be actionable. but if a sensible or positive injury be caused, such as would diminish the value of the water right, an action will lie, not only to recover damages, but to enjoin the future commission of the wrong.

¹ Affirmed, *Natoma Co. v McCoy*, 4 M. R. 590; *Hill v. Smith*, Id. 597.

Special issues, how framed. Where special issues are submitted to a jury, they should include all questions of fact raised by the pleadings and necessary to determine the case, and should be separately and distinctly stated, so that each question should relate to only one fact.

Appeal from the District Court, Fifth Judicial District, Tuolumne County.

The facts are stated in the opinion of the court.

H. P. BARBER, for appellants.

JOHN REYNOLDS, for respondents.

CROCKER, J., delivered the opinion of the court, NORTON, J., concurring.

This is an action to recover damages, and for an injunction to restrain the defendants, who are the owners of a sawmill on a stream, the waters of which the plaintiffs claim by prior appropriation for mining purposes, from interfering with the regular flow of water to plaintiffs' ditch, and from throwing sawdust and other refuse into the water, to the plaintiffs' injury. Special issues were submitted to a jury, who returned the following special verdict: "First. At what time did the plaintiffs' grantors appropriate the waters of Sugar Pine Creek for mining purposes? Answer: March, 1852. Second. At what time were the waters of Sugar Pine Creek appropriated by defendants' grantor for mill purposes? Answer: July, 1852. Third. Is the injury inevitable, and can the defendants have and enjoy the mill in the place they do, without creating the injury? Answer: Yes. Fourth. Do defendants use the water in running their mill in a reasonable way, and if any injury is had to plaintiffs, is it nominal, merely? Answer: Yes." The plaintiffs moved for perpetual injunction to restrain the defendants from doing the acts complained of; which the court denied, and ordered that the restraining order, issued at the commencement of the action, be dissolved, and that the bill be dismissed with costs: from which judgment the plaintiffs appeal.

The injuries complained of are: first, that the defendants' dam, which is above the plaintiffs' ditch, causes the water to

flow irregularly, at times holding it back and suffering but a small quantity to flow to the plaintiffs' ditch, and at others letting it down in greatly increased quantity; second, that the sawdust and refuse bark of the sawmill is thrown into the stream by the defendants, clogging and filling the plaintiffs' ditches and reservoirs, and thereby diminishing their capacity to flow and hold water. The evidence shows that these are serious injuries to the plaintiffs, causing them considerable loss and damage; but after the evidence was closed the plaintiffs' counsel stated to the court and jury that they did not care about the amount of damages, and would consent that they should be considered as merely nominal, as the suit was brought for the purpose of protecting plaintiffs' rights, and not for the amount of damages. This may have induced the jury to find that the damages were merely nominal. The court refused the injunction and dismissed the action, "on the ground that the dam was necessary for the defendants' mill, that the water was flowed into plaintiffs' ditch after its use by the mill, and that the injury was *damnum absque injuria*" to which the plaintiffs excepted.;

It is not controverted that the plaintiffs have a prior right to the use of the water of the stream, and that the defendants have done and continue to do the acts complained of; and the real question is, whether the injuries are of such a character as to entitle the plaintiffs to a remedy by injunction, to restrain the defendants from the future commission of the acts complained of.

First, then, as to the injury caused by the irregularity of the flow of water. The importance of a regular flow of water to mining ditches is apparent. The profits of the business of mining depend, to a very great extent, upon a steady, constant supply of water, flowing with regularity to the reservoirs constructed to receive and hold it, and regularly distributed to the miners who depend upon it for their supply. The rule of law is well established, that the owner of hydraulic works on the stream above, has no right to detain the water unreasonably. He must so construct his mill, or other works, and so use the water, that all persons below him, who have a prior or equal right to the use of the water, may participate in its use and enjoyment without interruption. Still, a mere

temporary or trivial irregularity in the flow of water, such as does not cause actual injury to the proprietor below, will not amount to an actionable injury. The question, in such cases, will turn upon the nature and extent of the injury. It is said that the proprietors above have a right to a reasonable use of the water; but the true test of this is, whether such use causes any positive or sensible injury to the prior appropriator or proprietor below, by diminishing the value of the right: *Angell on Water Courses*, Secs. 115-118; *Merritt v. Brinkerhoof*, 17 Johns. 306; *Tyler v. Wilkinson*, 4 Mason, 401.

In this case the jury found that the defendants could enjoy the mill in the place it was located, without creating injury; but the dam was necessary for the defendants' mill; evidently predicated its action upon the idea that if it was necessary for the use of the mill, the plaintiffs had no right to complain. This is clearly an erroneous view of the principles governing such cases, as we have already shown. It is true that the jury found that the defendants used the water in a reasonable way, coupled with a finding that the plaintiffs' damages were merely nominal. But, as already stated, the latter finding may have been predicated upon a statement of the plaintiffs' counsel that they would only ask nominal damages, as they were not the main object of the suit.

Besides, the third and fourth questions were submitted to the jury at the request of the defendants, the plaintiffs' counsel objecting thereto, and one of the assignments of error is that the court erred in submitting them. Each question submitted to a jury as a basis for a special verdict, should relate only to *one fact*; and grouping together several facts, as was done in these two questions, was very objectionable. The evil of this practice is evident, when we consider the answer to the third question in this case, which is in the affirmative as to the two facts stated in the question. The answer as to one of these facts, to be consistent, should be directly the contrary of the other. They answer that the injury was inevitable, and yet the defendant could have enjoyed the mill without creating the injury. Although the same contradiction does not exist in the answer to the fourth question, yet the two facts submitted therein should have been separated, and put in two questions

instead of one. The great difficulty in applying the principle of law to the case, arises from the manner in which those questions were framed and submitted. The court, therefore, erred in overruling the objection.

The next question is as to the right of action caused by throwing sawdust and refuse bark into the stream, causing damage thereby to the plaintiffs. This kind of injury to water is a peculiar one, as, while the actual quantity of the water in the stream is not thereby materially diminished, yet these acts so affect the water as to materially diminish the quantity the plaintiffs are able to take from the stream and use for mining purposes. Practically, it is well known to be a serious injury, very materially diminishing the value and profits of the ditch property. As prior appropriators the plaintiffs are entitled to damages for such injuries, and to be protected from future loss. The prior appropriator is clearly entitled to protection against acts which materially diminish the quantity of water to which he is entitled, or deteriorate its quality for the uses to which he wishes to apply it. This rule was applied to a case where sawdust from a mill was thrown into a stream near the city of Mobile, which injured the water for the use of the parties below: *Lewis v. Stein*, 16 Ala. 214. So it has been applied to a tan-yard: *Howell v. McCoy*, 3 Rawle, 256. So to water corrupted by mining operations: *Magor v. Chadwick*, 11 A. & E. 571. So to throwing dead animals in a spring: *Tate v. Parrish*, 7 Monroe, 325. In the case of *Hill v. King*, 8 Cal. 336, and *Bear River Water Co. v. York Mining Co.*, Id. 327, the question as to the liability of mining companies, on a stream above a ditch, for damages caused by mixing the water with mud and sediment, was examined, and one conclusion was that the prior appropriator below was entitled to the water so as to fill his ditch as it existed at the time of subsequent locations above; and that such subsequent locators had no right to so use the water as to diminish the quantity to which the prior appropriator was entitled.

The evidence shows that there was no necessity for throwing that refuse of the mill into the stream; and that prior owners of the mill wheeled it away; and the jury found that the defendant could enjoy the mill without creating the injury.

The evidence also shows that these acts cause very material injury to the plaintiffs. But there is no finding of the court or jury upon this important question. It is true that the court gave as a reason for dismissing the action "that the injury was *damnum absque injuria*," but it would seem that this remark was intended to apply solely to the first ground of the action, to wit, the irregularity of the flow of water. But if it was intended to include also the acts we are now examining, then it is clearly contrary to the evidence. It is probable, however, that this reason was intended as an announcement of a principle of law, governing both classes of injuries complained of, and if so, it is clearly erroneous. So that in any view of the case there is error in the proceedings of the court below. In cases where special issues are submitted to a jury it is important that they should include all questions of fact raised by the pleadings and necessary to determine the cause, and that they should be separately and distinctly stated. The record in this case is very defective in this respect. Not only are some of the questions objectionable for not stating the points separately, but several important issues were not submitted to the jury. Under these circumstances the plaintiffs are entitled to a new trial.

The judgment is therefore reversed, and the cause remanded for a new trial.

THE AMERICAN CO. V. BRADFORD ET AL.

(27 California, 360. Supreme Court, 1865.)

Supervision exercised over special verdicts. It is the province of the court to determine as to what facts the jury shall find specially, and neither party has the right to dictate the terms of any particular question to be submitted to the jury.

¹ **Adverse user of water gives title.** The use of water in any particular way for a period corresponding to the time limited by statute within which an action must be commenced to determine the right to it, raises

¹ *Ellis v. Tone*, 58 Cal. 291; *Brown v. Ashley*, 16 Nev. 312; *Smith v. Logan*, 18 Nev. 149; *Yankee Jim's Co. v. Crary*, 1 M. R. 196; *Cox v. Clough*, 70. Cal. 345.

a presumption of title to the same in the person enjoying the same as against a right in any other person, which might have been but was not asserted; but in order that this presumption of title may be conclusive, the right to the use of the water must have been asserted under a claim of title to the knowledge of the person having a prior right, and must have been uninterrupted.

Burden of proving right to water by adverse use. The burden of proving an adverse uninterrupted use of water for five years, to the knowledge of the person having a prior right, is on the party claiming it; and if he leave it doubtful whether the use was adverse, known to the owner and uninterrupted, it is not conclusive in his favor.

Failure to plead adverse use of water. The party claiming a right to the use of water by adverse possession, must set up the same as a defense in his answer; and if he does not, he loses the right to introduce evidence in support of it, and to have the court instruct the jury in relation to it.

Enjoined diverter may tap below. A decree enjoining the owners of a mining claim, situate on a creek below a dam at the head of a ditch, from diverting any water from or in any manner interfering with the waters of the creek that rise above the dam, does not prevent the owners of the mining claim from using the waters of the creek which may flow down the same after the ditch is supplied.

Appeal from the District Court, Tenth Judicial District, Sierra County.

The facts are stated in the opinion of the court.

WILLIAMS & JOHNSON, for appellants.

VANCLIEF & GEAR, for respondent.

By the Court, CURREY, J.

The plaintiff, composing a joint stock company, under the name and style of the "American Company," brought its action in June, 1863, against the defendants, alleging in its complaint that for more than ten years then last past it had been the owner and in possession of a certain ditch called the "Deadwood Ditch," leading and extending and conducting the waters from Deadwood Creek, in Sierra county, to Craig's Flat and Morristown, in the same county, for mining purposes. The plaintiff alleged that by means of the ditch and a dam at the head of it across the creek, it had during the period named, except when wrongfully prevented by the de-

defendants, diverted, as it lawfully might, from the creek at the dam sufficient of its waters to fill the ditch, which quantity of water had been, during all such period, appropriated and used by the plaintiff for mining purposes; and further alleged that plaintiff was still entitled to the rights which the company had so acquired. The rights and property thus acquired, the plaintiff alleged, had been obstructed by the defendants, who had, from time to time, without right entered upon the ditch and dam, and upon the creek above the dam, and by ditches, sluices and dams of their construction diverted large quantities of the waters of the creek from the ditch, by reason of which a sufficient quantity of water to fill the plaintiff's ditch could not and did not flow through it, whereby the plaintiff had sustained damage in a sum specified. The plaintiff also alleged a threatened continuance by the defendants of the wrongs of which they complain, and they show by allegations that remedies at law were inadequate for the redress of the injuries threatened, and then pray for judgment for damages and for an injunction restraining the defendants pending the suit, and that such injunction might, on the final determination of the case, be made perpetual.

All the defendants but one appeared and answered. They first admitted that plaintiff owned the ditch described, and then denied that plaintiff was at any time entitled to so much of the water of the creek as would fill its ditch, except when there was sufficient in the creek for that purpose after supplying the defendants' mining claims below the dam. The defendants also denied that during "the whole" of the period of ten years the plaintiff had diverted as much of the waters of the creek as would fill its ditch, or ever was entitled to divert therefrom that quantity, except when a surplus sufficient therefor remained after the defendants were supplied. The defendants further denied that they or either of them at any time "wrongfully, injuriously or unlawfully," diverted or turned any water of the creek out of or from the ditch, and in the same connection they denied that any water by them at any time diverted from the creek of right ought to have flowed into or through plaintiff's ditch, and in conclusion they denied that the plaintiff had sustained any damage by the acts of the defendants.

For an affirmative defense, the defendants answered that long prior to the location of the plaintiff's ditch and dam, certain mining claims were located and worked in the bed and banks of Deadwood Creek, by persons from whom the defendants had derived their right and title whereby the defendants' grantors became and were entitled to the use and possession of all the waters of the creek, or so much thereof as might become necessary to the working of these mining claims, as the prior appropriators of the waters of the creek. And they also averred that the waters diverted by them from Deadwood Creek naturally flowed down its bed upon defendants' mining claims until wrongfully obstructed and diverted by the plaintiff, and that the same were necessary to the working of such mining claims.

A preliminary injunction was granted in the case, and when the cause was tried a judgment was rendered for the plaintiff, and the injunction was made perpetual. The appeal is from the judgment and from an order of the court overruling a motion made by the defendants for a new trial.

The questions of fact in issue between the parties were tried by a jury. At the trial the defendants requested the court to instruct the jury to find specially in respect to certain facts. This the court refused to do, but submitted to them the following questions with directions to respond to them in writing:

First. Is plaintiff entitled to all the waters of Deadwood Creek at the point where the same is diverted by its ditch?

Second. Are defendants entitled to any portion of the waters of Deadwood Creek which rise above the dam of plaintiff, and if they are so entitled, to how much and at what times?

The court also directed the jury to return a general verdict and to fix the amount of damages if their verdict should be for the plaintiff.

The defendants excepted to the court's refusal to submit to the jury the questions of fact propounded on their behalf, and also to the submission of the two propositions set forth, and to the direction to the jury to fix the amount of damages in case their verdict should be for the plaintiff.

The jury rendered a general verdict for the plaintiff and assessed the damages at three hundred dollars, and to the first question they answered, "That plaintiff is entitled to all the

waters of Deadwood Creek at the point where the same is diverted by its ditch;" and to the second question they answered, "That defendants are not entitled to any portion of the waters of Deadwood Creek which rise above the dam of plaintiff."

The one hundred and seventy-fourth section of the Practice Act defines the nature and character of a general verdict, and also of a special verdict; and the next section provides that in an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. But in all other cases, the court may direct the jury to find a special verdict upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon.

It is the court's province to determine as to what particular facts the jury shall find specially, and neither party has the right to dictate the terms of any particular question to the jury, and for refusing to comply with such a request no error can properly be assigned.

At the request of the plaintiff, the court gave to the jury certain instructions, which it is not necessary to notice in detail. The instructions so given are, in our judgment, a just exposition of the law on the subjects to which they relate.

The defendants on their part requested the court to instruct the jury to the effect, that if they believed from the evidence that the ditch was located before the defendants' mining claims, and that the plaintiff had a good title to the waters of the creek above the dam, and had never entered into any agreement as to the quantity of water to be used by each of the parties, but also still believed from the evidence that the defendants had used a portion of the waters adversely to the plaintiff for more than five years before the commencement of the action, that then, to the extent of the water so used by the defendants, the jury should find in their favor. The court refused to so instruct the jury, and the defendants excepted.

The instruction requested proceeds upon the theory that the plaintiff acquired by prior appropriation of the waters of the creek a property therein of which it could not be divested otherwise than by a grant or by operation of law; and assum-

ing this, the defendants claimed that by their adverse use and enjoyment of a portion of the waters of the stream for the period stated, the presumption had arisen that they had derived from the plaintiff by grant, the right to the use of the water to the extent which they had during such period used the stream.

The general and established doctrine is that an exclusive and uninterrupted enjoyment of water, in any particular way, for a period corresponding to the time limited by statute within which an action must be commenced for the recovery of the property or of the assumed right held and enjoyed adversely, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person which might have been, but was not asserted: 3 Kent's Com. 441 to 446; *Bealey v. Shaw*, 6 East, 214; *Shaw v. Crawford*, 10 John. 236; *Johns v. Stevens*, 3 Vt. 316; *Union Water Co. v. Crary*, 25 Cal. 504.

The right which the defendants claim under the grant, which they assumed to exist, as evidenced by their adverse use and enjoyment of the water for five years, they denominate an easement. An easement or servitude may be created by grant or prescription, and when created it will pass by conveyance with the dominant estate (that is, with the estate to which it is appurtenant, as an incorporeal hereditament), attached to the servient estate, subjecting the latter to the benefit of the former. But the owner of the easement or servitude has no general property in nor seizin of the servient estate, though he may, by holding a fee in the dominant estate, have an estate of inheritance in the easement or servitude: Wash. on Ease, and Serv. Ch. 1, Sec. 1; Ersk. Inst. 352; *Wolfe v. Frost*, 4 Sand. Ch. 89.

A grant of an estate in lands, whether corporeal or incorporeal, may be presumed from an adverse enjoyment for the period corresponding to the Statute of Limitations within which an action might have been maintained against the person holding and enjoying adversely. But what must be the circumstances under which such presumption may arise? In order that the enjoyment of an easement in another's land may be conclusive of the right claimed, it must have been adverse in the legal sense of the term; that is, the right must

have been asserted under a claim of title, with the knowledge and acquiescence of the owner of the land, and uninterrupted. The burden of proving this is on the party claiming the easement. If he leaves it doubtful whether the enjoyment was adverse, known to the owner and uninterrupted, it is not conclusive in his favor: 2 Greenl. Ev. Sec. 539; Greenl. Cruise, Tit. 31, Ch. 1, note 1 to Sec. 21, and cases therein cited.

According to the common law system of pleading, a defendant could not give in evidence under the general issue, in excuse or justification of an alleged trespass, a right of common or a public or private right of way or a right to an easement, nor any interest in land short of property or right of possession: *Saunders v. Wilson*, 15 Wend. 338; *Babcock v. Lamb*, 1 Cow, 239; *Rouse v. Bardin*, 1 H. Black. 352; 2 Saund. Pl. and Ev. 856; 1 Chitty Pl. 505. A defense of the kind mentioned had to be pleaded specially. The reason of the rule was to prevent surprise: *Demick v. Chapman*, 11 John. 132.

The rule of the common law here referred to has not been changed so as to obviate the necessity of pleading specially such defense. By the law of this State the defendants were bound to interpose their alleged right by answer as well as by evidence, provided it be conceded that plaintiff had the prior right and title to the waters of the creek, as the requested instructions assumed as the predicate for the presumption that a grant of a portion of the waters had been made to the defendants. This defense was, within the language of the forty-sixth section of the Practice Act, *new matter*, which it was necessary to plead in order to become available for the defendants: *McKyring v. Bull*, 16 N. Y. 307. The defendants having failed to tender by answer an issue as to their right to a portion of the water as an easement or servitude derived from the plaintiff by grant to be presumed from an adverse user and enjoyment of it for five years, the court properly refused to instruct the jury as requested.

But the requested instruction was properly refused on another ground. All the conditions on which a grant may be presumed were not stated. The defendants may have used a portion of the waters to which the plaintiff was of right entitled, adversely to the company for five years before the action was commenced, but still without the knowledge or

acquiescence of the plaintiff, and not without interruption. If the jury had been instructed as requested it would have been erroneous, aside from the objection that the defense was not pleaded, because an adverse use and enjoyment may have been interrupted, or may have been without the knowledge and acquiescence of the plaintiff, in either of which events no presumption of a grant could have arisen: Wash. on Ease. 86.

The remaining alleged error is, that the decree in the case goes beyond the relief sought by the complaint. By the complaint the plaintiff makes no claim of right to the waters of the creek beyond an amount sufficient to fill its ditch; and the wrongful acts of the defendants, of which the plaintiff complains, are limited to an invasion of its right to the water to the extent stated. The creek may furnish an amount of water in excess of the quantity necessary to fill the ditch, to which the plaintiff has no right, but to which the defendants may be entitled as the owners of mining claims on the stream below the dam. The decree of the court forever enjoins and restrains the defendants from diverting any water from or in any manner interfering with the waters of the creek that rise above the plaintiff's dam, and from diverting any of the waters of the creek that would otherwise flow into and through the ditch, and from in any manner interfering with the plaintiff's ditch and dam.

The decree enjoining the defendants against interference with the waters of the creek which rise above the dam, we understand to mean, as the language fairly imports, not to prohibit the use and enjoyment by the defendants of the waters of the creek which may remain and flow down the creek after the plaintiff's ditch is supplied with the quantity necessary to fill it, but to prevent them from interfering with the water above the dam, or disturbing the plaintiff's right to a quantity sufficient to fill and supply the ditch; as to the surplus, it does not appear the plaintiff has the right to detain or divert it from the defendants.

Judgment affirmed.

**THE CHICAGO AND ROCK ISLAND RAILROAD CO. V.
THE NORTHERN ILLINOIS COAL AND IRON
COMPANY OF LA SALLE.**

(36, Illinois, 61. Supreme Court, 1864.)

Scope of assignment of error for refusal to grant new trial. Under the general assignment of error that the court should have granted a new trial, the plaintiff in error may urge the rejection of proper and the admission of improper evidence, also the giving of improper and the refusal of proper instructions, and that the evidence does not sustain the verdict; all of which are grounds for granting a new trial.

Verdict against evidence. When the evidence is conflicting, it is a question for the jury to determine from all the circumstances to whom they will give credit and their finding, when it is not clearly against the evidence, will not be disturbed.

The measure of damages in an action for waste water, supplied defendant from plaintiff's coal shaft, in the absence of special contract fixing the price, is its value to defendant, or what it was reasonably worth. It is no answer to the action that the water was going to waste; nor where a protection wall and a tank for its reception were built, with the consent, but not at the request, of the plaintiff, is it material to inquire what it would have cost to convey the water away by a drift.

Limits of cross-examination. On cross-examination a party has no right to call out evidence having no reference to any portion of the witness' testimony in chief.

Appeal from the Circuit Court of La Salle County.

Assumpsit by appellee against appellant for waste water supplied by appellee to appellant from appellee's coal shaft. The judgment below was for the plaintiff. The case is sufficiently stated in the opinion.

GLOVER, COOK & CAMPBELL, for appellant.

BULL & NASH, for appellee.

WALKER, C. J.

Under the general assignment of error that the court should have granted a new trial, the plaintiff in error may urge the rejection of proper and the admission of improper evidence; also the giving of improper and the refusal of proper instruc-

tions, and that the evidence does not sustain the verdict. These are all grounds for granting a new trial, and need not be specifically enumerated, but are embraced in the general assignment of error that the court refused to grant a new trial.

It is insisted, in favor of a reversal, that the evidence fails to sustain the finding of the jury. Loomis testifies that appellant, under the contract, was to finish the protection wall and erect their tank, and have the use of the water pumped into the tank by the appellee for one year, as a compensation for the expense of erecting the wall. On the other hand, Coulogne testifies that the appellant was to construct the wall and build the tank, and have therefor the use of the water as long as they desired. In this contrariety in the evidence of the persons who made the contract it was a question for the jury to determine, from all the circumstances, to whom they would give the credit.

In support of Loomis' evidence is the fact that, after the expiration of the year, and a difference had arisen as to the right to use the water by appellant, they reduced the price of switching appellee's coal cars from a dollar to fifty cents each, being only one half of the previous charge. And afterward, when appellee made other arrangements by which they did not require appellant to switch their cars, and an account was presented for the rent of a lot in Chicago used by appellees to store coal, at a charge of forty dollars per month, a claim for rent for the water was made, and the matter was adjusted by the charge for supplying water settling the account for the rent of the lot. And mutual receipts were passed between the parties. This occurred in the winter of 1859. These circumstances seem strongly to corroborate Loomis' version of the contract. No other motive is perceived for the reduction of the price of switching the cars and receipting the account for the rent of the lot in consideration of the supply of water. Otherwise they would certainly have insisted upon Coulogne's view of the contract. We are, therefore, of the opinion that the jury were warranted in finding the verdict.

Nor is it an answer to say that the water was going to waste, and was applied to no use by appellee. The true question is, what was the value of the water to appellant?

That is the true measure of the damages in the absence of a special contract: *Chicago Dock Co. v. Dunlap*, 32 Ill. 207. In this case the jury has found there was not a special agreement existing beyond one year, and after that time the damages would have to be measured by the value of the use of the water by appellant. We think the evidence shows that the wall and tank were built with the consent, but not at the request of appellee. And if so it is a matter of no consequence to inquire what it would have cost to convey this water away by a drift. These were questions outside of the case, and we can not see that such evidence could have shed any light on the issues then before the jury. The water was of use to appellant, they appropriated it, and thereby rendered themselves liable to pay what it was reasonably worth.

It is insisted that the court erred in not permitting Young to testify as to the cost of finishing the wall and constructing the tank. This evidence was called for on the cross-examination of the witness, and it had no reference to any portion of his testimony in chief. At that time it was not their right to call out this evidence, and it could only have been done as rebutting evidence, except by the exercise of the discretionary power of the court. On cross-examination, the court is not bound to permit an examination on questions about which no evidence was given by the witness in his examination in chief. If this evidence was material, appellant should have called the witness as his own when he came to rebut appellee's evidence. But Johnson, appellant's engineer, gives the substance of what was intended to have been proved by Young.

After a careful examination of the entire record, we can only say that the evidence was conflicting, but the jury were nevertheless warranted in finding as they did, and we feel ourselves unauthorized to disturb the verdict. Nor do we perceive any error for which the judgment of the court below should be reversed, and it is, therefore, affirmed.

Judgment affirmed.

¹ VANSICKLE, Respondent, v. HAINES ET AL., Appellants.

(7 Nevada, 249. Supreme Court, 1872.)

² Patent over ditch-head after appropriation. A settler before patent had diverted water from a natural stream; afterward the land covering that portion of the stream from which his flow was led was patented to another: *Heid*, that he acquired no right to the water as against the United States or its grantee.

The Statute of Limitations does not run against the United States.

The flow of water is an incident to the soil and goes with the land to the patentee.

The intended user of the water by one who diverts it is not material.

Appeal from the District Court of the Second Judicial District, Douglas County.

The facts are stated in the opinion.

R. S. MESICK, for appellants

ROBERT M. CLARKE, for respondent.

By the Court, WHITMAN, J.

Respondent claims damages against appellants for past diversion of the waters of Daggett Creek, and prays an injunction against further continuance of the injury alleged. The district court found for respondent, hence this appeal. Many questions are argued in the briefs of respective counsel, which it is believed are not pertinent to the controlling question involved.

The district court finds that the water-course in question, a small non-navigable stream, nowhere in its natural channel runs over the land of respondent, but does so run through the

¹ The doctrine of this case can not possibly stand with the right of appropriation recognized everywhere on the Pacific Slope. See especially a later case by the same court: *Hobart v. Wicks*, 2 M. R. 1; *Atchison v. Peterson*, 1 M. R. 583.

² That patent does not divest water rights is decided in *Farley v. Spring Valley Co.*, 58 Cal. 142; with which compare *Luz v. Haggin*, 69 Cal. 255.

NOTE.—Since the above annotations were made the text has been overruled in *Jones v. Adams*, 19 Nev. 79.

land of appellant Haines. It is also found that the respondent and Haines are the owners in fee of their respective lands, by patents from the government of the United States, that of Haines bearing date December 28, 1864; that at such date, and long prior thereto, respondent had appropriated and diverted from the natural channel of the creek, for his necessary purposes, a portion of its waters, which appropriation was interfered with by appellants in December, 1867; and that since that time they have used all, or nearly all, of the waters of the creek in a flume constructed and worked by them jointly for running wood. The court concludes that respondent acquired such a right by his appropriation as should be protected in equity.

He acquired no right against Haines prior to the date of the latter's patent, which could affect that grant, because there was no title in Haines to be affected by acts of the respondent. He could acquire no right against the United States, for as to that government he was a trespasser, in that he diverted water from its land not sought to be pre-empted by him. No presumption of grant arises against the sovereign, and no Statute of Limitation runs, save in some excepted instances, of which this is not one.

The government of the United States then had, at the date of its patent to Haines, the unincumbered fee of the soil, its incidents and appurtenances; that was passed to Haines, there being no reservation in his patent, and none is suggested. He became the owner of the soil, and as incident thereto, had the right to the benefit to be derived from the flow of the water therethrough; and no one could lawfully divert it against his consent. What use he made of it, so that such use did not interfere with the adjoining riparian proprietors, was for him to elect. He had precisely the same right to use it for his flume as for his household, his cattle or his land.

In this case it is urged that such use is beyond riparian rights. In a recent case in New York, an objection precisely contrary was made, and the reply of the court is a complete answer to either and both: "It is insisted by the defendant that equity ought not to interfere in behalf of the plaintiffs, for the reason that they do not want the water-power afforded by the stream for use. This is a mere assumption. * * *

WEST CUMBERLAND IRON CO. v. KENYON. 203

But if the facts claimed were clearly established, it would not protect the defendant in wrongfully withholding the stream. No man is justified in withholding property from the owner, when required to surrender it, on the ground that he does need its use. The plaintiffs may do what they will with their own:" *Corning v. Troy Factory*, 40 N. Y. 206. From the facts found it follows that appellant Haines, owner of the soil, has the right to the flow of the water of Daggett Creek in its natural channel; what use he may make of it when there is beside the question, so far as respondent is concerned. The right of Haines protects his co-appellants.

The decree of the district court is reversed, and the cause remanded, with instructions to enter a decree for appellant.¹

WEST CUMBERLAND IRON AND STEEL CO. v. KENYON.

(L. R. 11, Chancery Div. 782. High Court of Justice, 1879.)

Discharge of water into neighboring mine by bore hole. Defendants, the owners of a mining property, sank a shaft by which they tapped the water which had formerly found its way into certain old workings on their own ground, and had thence percolated into the plaintiff's mines. The defendants then made a bore hole at the bottom of the shaft. It was admitted that the making it was not in due course of mining, but only for the purpose of getting rid of the water. The effect of the bore-hole was to let off the water into the above-mentioned old workings on the defendants' ground, whence it percolated into the plaintiff's works in the same way in which it would have done if neither shaft nor bore hole had ever been made: *Held*, that the defendants had not, by making the shaft, so appropriated the water as to lay themselves under an obligation to keep it from coming upon the plaintiff's land, and that, as the effect of the defendants' operations was not to throw upon the plaintiff's land any burden which it had not borne before, the plaintiff's case failed.

This was an appeal by the defendants from a decision of Mr. Justice Fry, L. R. 6 Ch. Div. 773.

¹In response to petition for rehearing an elaborate opinion was filed, which is excluded on account of its extreme length. The rehearing was denied, the court defending the position assumed in the original opinion.

HERSCHELL, Q. C., COOKSON, Q. C., and PLUMMER, for the appellants.

We do not dispute the finding of facts by the judge, but we deny that there was any cause of action. The bore hole was made to get rid of the water. If we had done nothing the water would have come to the plaintiffs' mine just the same. It is not correct to say that we appropriated the water for our own benefit; we only wanted to get rid of it. No one has a right to complain of what I do on my own land, if what I do leaves him in the same condition as if I had done nothing: *Smith v. Kenrick*, 7 C. B. 515; *Smith v. Fletcher*, L. R. 9 Ex. 64; 2 App. Cas. 781; *Nichols v. Marsland*, 2 Ex. D. 1. It is for the plaintiffs to show that a larger volume of water comes to them than would have come if there had been no bore hole, which they have not done. No damages can be claimed for any injury arising from gravitation and percolation: *Wilson v. Waddell*, 2 App. Cas. 95; *Bainbridge on Mines*, page 307.

NORTH, Q. C., and INGLE JOYCE, *contra*.

The question which the defendants argued below was whether this bore hole was made in the legitimate course of mining operations. They denied that it was made for the purpose of getting rid of the water. This ground they now give up. We do not dispute that the defendants may allow the water to flow to our mines in the natural way.

(JAMES, L. J.—What the defendants say is, that they have a right to do what they please on their own ground provided they do not by their operations make the water come to your mines in a different quantity, or by a different channel, or at a different time.)

We rely on the principle laid down in *Hurdman v. North-eastern Railway*, 3 C. P. D. 168, that the causing by an artificial work the passage of water into a neighbor's land gives a right of action. If water which would have reached my land at one time is made by artificial means, adopted for that purpose, to reach it at an earlier time, that is an actionable wrong. The case of *Westminster Brymbo Co. v. Clayton*, 36 L. J. Ch. 476, is very like the present.

WEST CUMBERLAND IRON CO. V. KENYON. 205

JAMES, L. J.—In that case the same water would not have found its way to the plaintiffs' land if the defendants had done nothing.

If a man artificially stores up water on this ground he has appropriated it, and can not then send it on his neighbor's ground: *Lomas v. Scott*, 39 L. J. Ch. 834. The rule is laid down in our favor in *Smith v. Fletcher*, Law Rep. 7 Ex. 305, and we contend that the Exchequer Chamber did not differ from the court below as to the point of law, though a new trial was granted. The law is settled by *Baird v. Williamson*, 15 C. B. (N. S.) 376, and other cases, that a mine owner is not liable for a flow of water owing to gravitation and percolation, but he must not be an active agent in sending it on his neighbor's mine. Here the bore hole must have accelerated the flow of water into the plaintiffs' land, or it would have been of no use to make it.

HERSCHELL, in reply.

JAMES, L. J.

Upon the question of fact in this case I have arrived at the same conclusion as Mr. Justice Fry, and, as it appears to me, there is no real conflict of evidence. The evidence shows that the water which was tapped by the Naw Banks shaft, and which was afterward discharged through the bore hole into the defendants' old workings at the Limefitts pit, was water which, following the stratification of the country, had previously found its way into the same subterraneous hollows from which water was pumped up by the pumps which at one time were used at the Limefitts shaft, and that the same water practically and substantially found its way down into those hollows to the same extent as it found its way afterward through the shaft and the bore hole. The evidence upon that is plain. Several witnesses were called, experts who know the country, who said that they had no doubt that every particle of water would have gone down and must have been going down into the Limefitts shaft when the pumps were going on; that being the course by which these water-bearing strata discharged their water so as to prevent its rising up above the sixteen fathoms, down to which distance the strati-

fication was quite dry. It seems to me, upon all the evidence, that there were these water-bearing strata draining down into the hollows that had been formed by the old workings of the principal vein of the Limefitts property, and thence into the lowest level, and that the defendants made a shaft which did, to a certain extent, tap that water, but only diverted into that shaft (as I am satisfied) for a time the water which, previous to that diversion, was finding its way down into the lowest level.

Several witnesses, both for the plaintiffs and defendants, give evidence in exactly the same way, and if there was any case intended to be made that what the defendants have done produces an extra substantial burden or change in the position of the defendants by reason of more water being thrown upon them, I should have expected that there would have been some evidence directed to that point, and that there would have been some cross-examination of the defendants' witnesses upon the point which they proved so distinctly, that is to say, that in their judgment and belief and according to their knowledge, all the water had originally found its way down to the plaintiffs' levels. Then, if that be so, the working of the defendants' shaft and the bore hole has not been shown to have thrown any additional water whatever on the plaintiffs. On the other hand, this is to be borne in mind, that the way in which the case is now presented to us on behalf of the defendants, is this: "We do not treat it as a mining question; it has nothing to do with the case of *Smith v. Kenrick*, 7 C. B. 515, or any particular law as applicable to mining; we deal with it exactly as if it were something on the surface. We have made certain things upon our land, and we have done that without doing you any mischief whatever. That is to say, we have done something on our own land, as we had a right to do; we had occasion (or not having any occasion we were minded) to sink a shaft in our own land, and finding that that shaft was getting filled with water, we made a drain from the bottom of that shaft so as to prevent the water accumulating, which would have destroyed it. But we drained that water into our own land; we drained it into some old hollows which were there, and which were calculated to receive the water, and from which hollows the water, no doubt, found

its way into the plaintiffs' land; but found its way exactly in the same course, as far as the plaintiffs are concerned, as before it left our hollow, in exactly the same place and in exactly the same way and to exactly the same extent as it would have done if we had not done anything of the kind."

Now, Mr. Justice Fry seems to have thought that if once a man appropriated water (which does not seem to me to be a very accurate expression, because the very last thing in the world the defendants intended to do was the storing water so as to appropriate it), that the moment he had done something by which the water became collected in his hollow, then he became bound to discharge that water in such a way that it would never reach his neighbor's land. I am not aware that there is any principle or any authority for that proposition. I have always understood that everybody has a right, on his own land, to do anything with regard to the diversion of water, or the storage of water, or with regard to the usage of water, in any way he chooses, provided that when he ceases dealing with it on his own land, when he has made such use of it as he is minded to make, he is not to allow or cause that water to go upon his neighbor's land so as to affect that neighbor's land in some other way than the way in which it had been affected before. That is the common use of water. A man receives the rain water from his roof; he does not allow it to settle upon the surface, but he receives it on his roof, and collects it into the pipes, and then lets it go down upon his own land, and from his own land it gets into his neighbor's land. But unless his neighbor receives that water in some different way or quantity from what he had done before, there is no legal right of action. If a man chooses to make any quantity of fish ponds, or mill ponds, or artificial lakes, or pleasure waters, or fountains, or anything of that kind, on his own land, he is at liberty to do so, provided that, when he has finished doing so, he does not increase the burden upon his neighbor. And if his neighbor complains, he has a right to reply, "What is it to you what I have been doing on my own land? The same quantity of water leaves my land, and leaves my land through exactly the same aperture, and gets into your field in exactly the same way as it did before." If there is a lake on my property into which I drain my field, and there is a passage from that lake

into my neighbor's land, how can it signify whether I drain my field into the lake by one, two or three openings, provided the same overflow as before goes through the same outlet into my neighbor's land? If the fact be, as we have found it to be, that the water which was turned by the shaft and bore hole into the hollows about the Limestone pit was the same water which would have found its way into the same hollows independently of that shaft and bore hole, it seems to me that the plaintiffs have nothing whatever of which to complain.

The defendants are no longer justifying themselves by the false issue which was fought in the court below for so many days, namely, whether this was a proper mining operation. That false issue having been abandoned, we have nothing but a common case which may occur to anybody on the surface; that is to say, a man makes a pit on his land, and to prevent its being filled with water he puts a drain at the bottom of it and runs the water off into his own land, whence it finds its way to his neighbor's land in the same way as it had done before. I am of opinion that this is a case in which the defendants have used their own land, and have not been shown to have injured their neighbor's in so using it, that the plaintiffs have failed in showing that they have any legal ground of action, and the action ought therefore to have been dismissed.

BRETT, L. J.—This action is brought on the ground of an alleged breach of the maxim *sic utere tuo ut alienum non laedas*. The cases have decided that where that maxim is applied to landed property, it is subject to a certain modification, it being necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land. If the plaintiff only shows that his own land is damaged by the defendant's using his land in the natural manner, he can not succeed. So he must fail if he only proves that the defendant has used his land otherwise than in the natural way, but does not prove damage to himself. Both points are here in issue. For a long time both parties contended about one of these points, and not about the other. The plaintiffs proved that the defendants used their

property otherwise than in the natural manner necessary to give them the due enjoyment of their rights of ownership, and otherwise than in the regular course of mining, but they failed to prove that any greater burden was thrown upon their land than it would have had to bear if the defendants had done nothing, and Mr. Justice Fry seems to have been of that opinion.

If water percolates through the defendants' land, and gets into a defined channel, and then goes into the plaintiffs' land, and the defendant makes a pond which receives the water, and then makes a cutting which allows the water to go again into the same defined channel, so that the old flow into the plaintiffs' land is resumed, is the defendant liable? Mr. Justice Fry says that he is, on the ground that the defendant having collected the water has made it his property, and is bound to control it, and may not restore things to their original condition. With deference to him, I know of no such law. The merely obtaining a temporary control over the water does not impose on the defendant the obligation of keeping it, nor prevent him from restoring it to the strata from which it came, unless he makes it flow differently. Therefore, agreeing with Mr. Justice Fry as to what I believe to have been his findings of facts, and his inferences from those findings, viz., that no larger quantity of water came to the plaintiffs' lands than if no shaft had been made, I differ from his view that the defendants having once intercepted the water were not at liberty to let it go again.

COTTON, L. J.—The case launched by the plaintiffs is that by reason of the operations of the defendants a large quantity of foreign water is thrown upon the plaintiffs' land, and that the defendants have no right to send it there to the damage of the plaintiffs. This is subject to the exception that if the flow of water is only the result of the defendants using their land in the natural way, the plaintiffs can not complain, and it is established by the cases that taking out minerals is a natural use of mining property, and that no adjoining proprietor can complain of the result of careful and proper mining operations. To meet this the plaintiffs allege that making the bore hole is not a proper mining operation, and this is now admitted.

The question remains whether any substantial quantity of

foreign water has been thrown upon the plaintiffs' lands by the operations complained of, and this is a question of fact. Mr. Justice Fry does not appear to have come to a positive conclusion on this point, but he seems to have considered that the water which went through the bore hole would have found its way to the plaintiffs' land if the defendants' shaft had not been made. In this I agree with him.

Now, underneath the defendants' land were old workings reaching up to the Limefitts shaft. While the pumping was continued there, the water was prevented from finding its way to the plaintiffs' land. The pumps were abandoned, and the water from the old workings penetrated into the plaintiffs' land, and threw additional pumping upon them. The water which passed through the bore hole went into these same old workings, and thence percolated into the plaintiffs' land. The plaintiffs say it lies on the defendants to show that the making the bore hole threw no additional burden on the plaintiffs' land, Assuming that to be so, the question is whether we ought not, on the evidence, to say that without the bore hole the same water would have found its way to the plaintiffs' works, and that, therefore, no additional burden is imposed on them. I am of opinion that this is the conclusion to be drawn from the evidence.

We then come to the ground taken by Mr. Justice Fry. He says that the defendants, by making the shaft, appropriated the water and made themselves masters of it, and so became bound to prevent it from flowing into the plaintiffs' works. This is a fallacy. The action is not for damage done by allowing that water to escape. If a case were made that the water was allowed to escape suddenly, it would be quite a different matter, but nothing of the kind is alleged. The complaint made is that the defendants, by making the bore hole, have prevented their shaft from being a water-containing reservoir. Now, if, in consequence of this, the water had entered the plaintiffs' land by a different course, the plaintiffs would have had quite another case, but all that the defendants have done is to alter the course of the water into a reservoir on their own land. There is an alteration in the way it gets there, but there is no addition to the water thrown into the plaintiffs' lands, nor any variation in the time of its getting there. I am, therefore, of opinion that the action fails.

DOUGHERTY V. HAGGIN ET AL.

(56 California, 522. Supreme Court, 1880.)

¹Miner's inch treated as uncertain, in verdict. When, in an action to determine plaintiff's rights in the water of a certain creek, the complainant averred that he was entitled to 500 inches "measured under a four-inch pressure," and the jury found that he was entitled to forty inches, "miners' measurement." *Held*, that the verdict was so uncertain as to necessitate reversal.

Appeal from a judgment for the plaintiff, and from an order denying a new trial, in the Superior Court of Kern County, BRUNDAGE, J.

LOUIS T. HAGGIN, for appellant.

The judgment or decree should be certain; otherwise it is void: *Kelley v. McKibben*, 53 Cal. 13; *Ballard v. Davis*, 1 Marsh. J. J. 377; *Honore v. Colmesnil*, Id. 525; *Lawless v. Barger*, 9 Bush. 666; *Noland v. Noland*, 12 Id. 426; ¹*Ross v. Adams*, 13 Id. 370; *Brittenham v. Cummins*, 1 Bibb. 487; *Munger v. Grinnell*, 9 Mich. 544.

R. E. ARICK, for respondent.

ROSS, J.

The plaintiff, claiming to be entitled to the use of certain waters of a certain creek in Kern county, called Clear Creek, brought this action for the purpose of enjoining the defendants from diverting the said waters, and to recover damages, etc. The verdict returned is in these words: "We, the jury, find that the plaintiff is entitled to forty inches, miners' measurement, of the waters of Clear Creek, described in the complaint; and we further find, that he has been damaged by the defendants in the sum of \$1,200." Judgment was entered for the plaintiff in accordance with the verdict. The complaint avers

¹Miner's inch in Colorado is fixed by Statute, G. S. § 3472.

that the plaintiff is entitled to "five hundred inches, measured under a four-inch pressure, of the waters" in controversy, but nowhere makes any reference to "miners' measurement." It was admitted at the argument, that these latter terms have no fixed meaning, and that an inch of water according to "miners' measurement" in one locality is sometimes a very different quantity from an inch according to "miners' measurement" in another locality. As already observed, the pleadings make no reference to such measurement, nor is there any thing anywhere in the record to indicate what is meant by the "forty inches miners' measurement, of the waters," awarded by the jury and the court below to the plaintiff. For aught that the record shows, and for aught that we know, the quantity thus awarded him may exceed the "five hundred inches, measured under a four-inch pressure," claimed in his complaint. It was suggested by counsel for the respondent, that the words "miners' measurement," used by the jury in its verdict, and by the court in its decree, might be treated as surplusage, and disregarded, and the verdict and decree read as giving to the plaintiff "forty inches, measured under a four-inch pressure."

It is clear that we can not thus alter the language and intent of the court and jury.

The judgment and order must be reversed, and the cause remanded to the court below for a new trial, with leave to the plaintiff to amend his complaint if he shall be so advised.

Ordered accordingly.

MCKINSTRY, J., and MCKEE, J., concurred.

1. Pollution of natural stream and diversion of artificial water-course. *Wood v. Waud*, 3 Exch. 748.

2. Bill for quiet enjoyment maintained for the protection of an ancient stream supplied by mines, which defendants threatened to divert by driving new adits: *Falmouth v. Innys*, Mosely, 87.

3. What is reasonable use of water to propel machinery is a jury question: *Pool v. Lewis*, 5 M. R. 523.

4. The doctrine of the appropriation of water, as customary on the Pacific slope, approved by the Supreme Court of the United States: *Atchison v. Peterson*, 1 M. R. 583.

5. Measure of damages for diversion of water: *Hanover Co. v. Ashland Co.*, 10 M. R. 240.

6. A second suit for continued diversion may be brought pending appeal on suit for the original diversion: *Toombs v. Hornbuckle*, 13 M. R. 430.

7. Diversion prevented by injunction: *Tuolumne Co. v Chapman*, 11 M. R. 34; cutting ditch enjoined: *Derry v. Ross*, 1 M. R. 1.
8. The same court may declare for diversion of water and filling up plaintiff's ditches: *Gale v. Tuolumne Co.*, 14 Cal. 25.
9. Law of underground currents of water: *Hanson v. McCue*, 42 Cal. 303; see Note 2, 13 M. R. 382.
10. Respective powers of State and United States over navigable streams: *Woodruff v. North Bloomfield Co.*, 18 Fed. 756.
11. Vendee under executory contract is not a riparian owner: *Smith v. Logan*, 18 Nev. 149.
12. One who allows his older ditch to lie idle, and allows subsequent diversion without notice of his prior appropriation will be presumed to have abandoned the same: *Dorr v. Hammond*, 7 Colo. 79.
13. A settler on public lands on a stream takes subject to water rights previously appropriated: *Lytle Creek Co. v. Perdue*, 2 Pac. 732.
14. Covenant in relation to the use of water runs with the land: *Weill v. Baldwin*, 64 Cal. 476.
15. Water unlawfully diverted, can not be sued for as "goods sold and delivered:" *Parks Canal Co. v. Hoyt*, 57 Cal. 44.
16. An agreement to transfer a water right is not an agreement to deliver water: *Booth v. Chapman*, 59 Cal. 150.
17. Patent does not divest adverse water rights acquired since the act of July 26, 1866: *Farley v. Spring Valley Co.* 53 Cal. 142; compare *Lux v. Haggin*, 69 Cal. 255.
18. Only the surplus water can be taken by a second appropriator: *Brown v. Mullin*, 65 Cal. 89; use of surplus will not be enjoined: *Edgar v. Stevenson*, 70 Cal. 286.
19. Diminution to be enjoined must be material: *Loud Gold M. Co. v. Blake*, 24 Fed. 249.
20. A party agreeing to sell water for the use of a placer claim, held bound to maintain a ditch at a proper elevation: *Sierra Co. v. Baker*, 70 Cal. 572.
21. Construction of the right to take water to irrigate land to a certain number of inches, with an agreement to pay *pro rata* proportion for repairing ditch: *Brown v. Evans*, 18 Nev. 141.
22. Where a party leads water into a stream and attempts to retake it, the burden is upon him to show that he does not take away more than he brought into it: *Wilcox v. Hausch*, 64 Cal. 461.
23. When claimant does not show title from first appropriator: *Held*, that the date of his own use must be treated as the date of the inception of his right: *Chiatovich v. Davis*, 17 Nev. 138.
24. Water appropriated for irrigation becomes a vested right: *Kaylor v. Campbell*, 11 Pac. 301.
25. Agreement to purchase for quartz mill, limited to time of ownership of mill: *Table Mt. Co. v. Chavanne*, 70 Cal. 616.
26. Irrigation company, organized to supply its stockholders, held liable as a company, where it allowed certain stockholders to take water in excess of their right: *O'Connor v. North Truckee Co.*, 17 Nev. 245.
27. The amount of water to which the first appropriator is entitled

must be limited to the amount actually applied to the purpose of irrigation: *Simpson v. Williams*, 18 Nev. 432.

28. Measure of damages where water would not have reached the land, and where other water could have been procured: *Mack v. Jackson*, 13 Pac. 542.

29. Court of equity has power to distribute water: *Frey v. Lowden*, 70 Cal 550.

See APPROPRIATION, DITCH, DRAINAGE, FLOODING, IRRIGATION, RIPARIAN RIGHTS, SPRINGS.

ABSON V. FENTON ET AL.

(1 Barnewall & C. 196. King's Bench, 1823.)

¹Test of what is a "necessary" or "convenient" way. Where the right exists to get the minerals under land, and for that purpose has been granted the right to construct "necessary" or "convenient" ways, the test of the proper exercise of such right is "whether the direction chosen has been such as a person of reasonable and ordinary skill and experience would have selected beforehand, and whether the mode adopted has been such as a prudent and rational person would have adopted if he had been making the road upon his own land and not upon the land of another."

Trespass, for breaking and entering plaintiff's close, subverting the soil, laying wagon-ways, digging trenches and raising banks and ramparts there. Pleas, first, not guilty; secondly, that the *locus in quo* was parcel of the waste lands mentioned in a private act of parliament, made for the purpose of inclosing the waste lands in the manor of Wakefield, whereof the Duke of Leeds was lord, and thereby intended to be divided and inclosed; by which said act it was, amongst other things, enacted "that the then Duke of Leeds, his heirs and assigns, should and might, from time to time, and at all times thereafter, have, hold, win, work and enjoy all mines, coal, ironstone and minerals, of what nature or kind soever, and all his then present open working stone-quarries, then working by himself or his tenants, within and under the said commons, encroachments and waste grounds; together with all convenient and necessary ways, way-leaves, roads and passages, then already made and thereafter to be made, and liberty of laying, making and repairing wagon-ways and other ways in, over and along the same, or any of them, or any part thereof, and of searching for, winning and working the said mines and minerals, and loading and carrying away the coal, ironstone, lead, minerals, things and other produce thereof, and of making

¹ *Bishop v. North*, 15 M. R. 220; *Senhouse v. Christian*, 1 Term, 560; *Pit v. Clavernith*, 1 B. R. 818; *Richards v. Richards*, 1 Johns. (Eng.) 255; *Dand v. Kingscote*, 6 M. & W. 174; *Marvin v. Brewster Co.*, 13 M. R. 40.

pits, shafts, pit-rooms and heap-rooms, drifts, levels, ways and water-courses (as well as using and continuing those already made), and of erecting and using fire engines and other engines, and of altering, changing, pulling down and carrying away the same, or any of the materials thereof, and to have and use the stone got in the course of sinking pits or shafts, or working and getting the said minerals so reserved as aforesaid, at his and their own free will and pleasure; and to do all such other acts and things, either then in use or thereafter to be invented, as might be necessary or convenient for the full and complete enjoyment thereof, in as full, ample and beneficial a manner, to all intents and purposes, as he or they could or might have done in case that act had not been made; the person or persons who, for the time being, should be owners or proprietors of the ground whereon such pits or workings should be made, driven or worked, or such engines, machines or buildings erected, or such coals or rubbish laid, or such ways, roads or passages made and used, being allowed and paid a reasonable satisfaction for damages, to be settled and ascertained as thereafter directed;" and that the *locus in quo* was part of the waste lands divided and allotted under that act.

The plea then set out a demise by the Duke of Leeds to defendant Fenton, of the coal under part of the said wastes, and that it was convenient for him to make a wagon-way over the *locus in quo*; that it was necessary to make excavations and throw up ramparts in order to preserve the level of the wagon-way, and that those were works, acts and things which the Duke of Leeds might have done if that act had not been made; wherefore Fenton, in his own right, and the other defendant, as his servant, did the acts complained of, as they lawfully might, etc. Replication, *de injuria*, etc., and new assignment, that the defendant broke and entered the said close, dug pits, made ramparts, etc., on other and different occasions, and for other and different purposes than those mentioned in the said second plea, and in more and other parts of the said close, and in other directions and other modes than were necessary and proper for the reasonable enjoyment of the said powers, liberties and privileges reserved by the said act of parliament. Issue on the replication, and plea of not guilty to the new assignment.

At the trial, before BAYLEY, J., at the last spring assizes for Yorkshire, it was proved for the plaintiff that the defendants had laid a wagon-way across the close in question, and, in order to preserve the level where the ground was low, had excavated a large quantity of soil from each side of the proposed way, which was thrown up into an embankment or rampart. The defendant proved his title, as set out in the second plea, and a great deal of evidence was produced on each side as to the propriety of making the wagon-way in the direction and manner that had been adopted. The learned judge left it to the jury to say, first, whether the road had been carried in a proper and convenient direction; secondly, if the direction was improper, what damage the plaintiff had thereby sustained; thirdly, whether excavating the adjoining soil was a reasonable mode of making the embankment; and fourthly, what damage the plaintiff had sustained by reason of the soil for the embankment having been excavated from the close, instead of being brought from some other place. The jury returned their verdict as follows: "We are of opinion that it would have been difficult to find a more eligible line of road than passing through the plaintiffs' field; but that it would have been less injurious to the land and equally convenient to the defendants if it had been carried nearer the line of the lock railroad. We find that the plaintiff has suffered some damages by the removal of the soil to make the embankment, and assess the damages at £10, and that that was not the most convenient mode of making the embankment." In Easter term last, Scarlett obtained a rule to show cause why the verdict should not be set aside, and a new trial had, on the ground that the jury ought not to have been called upon to say whether the plaintiff had sustained some injury which might, by possibility, have been avoided, but whether the defendant intended to adopt the most convenient and least injurious mode of laying his wagon-way. On a former day in this term,

HULLOCK, Serg't, LITLEDALE and BROUGHAM, showed cause.

SCARLETT, *contra* (with whom was TINDAL), was stopped by the court.

ABBOTT, C. J., delivered the judgment of the court.

We think the rule for a new trial in this case should be made absolute. The case arises on an act of parliament made for the enclosure of the wastes in the manor of Wakefield, whereof the Duke of Leeds was lord, and wherein there were very valuable coal mines and minerals belonging to the lord, which he was in the habit of getting and carrying away over the wastes. These minerals, with this privilege, were probably of a value much beyond, not only the lord's interest in the surface of the wastes, but even the whole surface thereof, and, therefore, it is not to be supposed that he would enter into any compact for the inclosure of the wastes, wherein his rights to work and carry away his minerals should not be fully reserved. The nature and situation of the wastes and minerals, and the clauses providing that all the owners of allotments shall contribute to make good the damage done to any one, and the expression, "at his free will and pleasure," which occurs in the clause reserving his privilege of making ways, etc., lead strongly to an inference that the lord's right was paramount to the rights of the commoners. But even if the lord's right in this respect were limited, as in the case of appropment, to the leaving a sufficiency of pasture still the lord would not have been subject to any action at the suit of a commoner for making a road in any direction, and by any method, whether by digging of the soil or otherwise, that he might think fit to adopt, provided a sufficiency of common were left. All question of sufficiency of common is now determined by the inclosure. But if, before the inclosure, the particular direction in which a road might be made, or the quantum of soil dug in any part of the waste for the making it, did not furnish the criterion by which the exercise of the lord's right was to be judged or determined, they will not now do so absolutely and without regard to circumstances, even upon the narrowest construction that can be put upon the act of parliament, considered as the private agreement and compact of the parties sanctioned by the legislature. But without deciding upon these points, we are all of opinion that, upon the construction of the words, "convenient *and* necessary," which occur in one part of the section, and the words,

"necessary or convenient," which occur in another part, the true question is not whether the road has been made in the direction, or in the manner least injurious to the owner of an allotment; or in that direction, or by that mode which a strict and rigid necessity would point out; much less whether it has been made in that direction or by that mode, which, upon a view of the work when accomplished, and when a better judgment may possibly be formed than could have been formed before, may be thought by persons possessing the highest degree of skill and experience to be the best that could have been devised; but whether the direction chosen has been such as a person of reasonable and ordinary skill and experience would have selected beforehand, and whether the mode adopted has been such as a prudent and rational person would have adopted if he had been making the road over his own land, and not over the land of another? This view of the subject will, on the one hand, exclude all wanton, capricious and causeless injury to the owners of the allotments; and, on the other hand, will admit of an exercise of the right reserved by the statute in such a manner as may make the right beneficial to the lord. Whereas, it must be obvious that if the adjoining soil may not, under any circumstances, be dug to procure materials for raising elevated ramparts in hollows and valleys, or if eminences may not be cut through, but a level, or the requisite inclination, must only be made by erecting pillars or arches, or procuring materials from a considerable distance and at a considerable expense, the reservation of the right will, in many instances, become futile and unavailing, by reason of the cost required for the exercise of it. This is not exactly the view of the subject that was taken at the trial, and therefore, we think there should be a new trial, and that the costs should abide the event.

Rule absolute.

BISHOP v. NORTH.

(11 M. & W. 418. Court of Exchequer, 1843.)

¹ “Railway” covers steam railway—Compensation acts apply to future owners. By an act of 32 Geo. III, for making a canal, the “owners or proprietors of any mines of coal” within certain parishes, were empowered to make any railways or roads to convey their coals, etc., to the said canal, over the lands or grounds of any person or persons, paying or tendering satisfaction, etc., for the damage to be thereby occasioned: *Held*, that this power was not limited to persons who were proprietors at the time of the passing of the act or of the making of the canal, but extended to other persons who had become such since, and that such owners or proprietors were empowered to make railroads to be traversed by locomotive engines.

This was a special case sent for the opinion of this court by the Vice Chancellor of England.

By an act of parliament passed in the 32 Geo. III, entitled “An act for making and maintaining a navigable canal from the Cromford Canal in the county of Nottingham, to or near to the town of Nottingham, and to the river Trent near Nottingham Trent Bridge, and also certain collateral cuts therein described from the said intended canal,” reciting that the making and maintaining a canal for the navigation of boats, barges and other vessels, from the Cromford Canal, in the parish of Eastwood, in the county of Nottingham, to or near to the town of Nottingham, and to join and communicate with the river Trent near Nottingham Trent Bridge, and also the making and maintaining the several collateral cuts thereafter mentioned, with proper railways and roads to the said intended canal and collateral cuts, would open an easy communication between several valuable mines of coal and the town of Nottingham and the country with which the said intended canal and collateral cuts would communicate by means of the river Trent, and would facilitate the conveyance of stone, limestone, lead, iron, marble, corn, groceries and other articles, for the accommodation of the said town of Nottingham and the country with which the said canal and collateral cuts would

¹ *Abson v. Fenton*, 15 M. R. 215.

communicate as aforesaid, and would be of public benefit; it was enacted, that certain persons therein named should be a company for the better carrying on, making, completing and maintaining the said intended canal and collateral cuts, according to the rules, orders and directions thereafter mentioned, and should for that purpose be one body politic and corporate, by the name of the Nottingham Canal Company, etc. And the said Nottingham Canal Company were thereby authorized to make a canal, navigable for vessels, from the Cromford Canal to the river Trent, with collateral cuts as therein mentioned, and with the usual and necessary appurtenances. By the 54th section it was enacted, "That in case any proprietor or proprietors of any manor or estate, containing any mines of coal, ironstone or other minerals, or the renters, lessees or occupiers of the same, should find it expedient or necessary to make any railway or roads to convey his, her, or their coals, ironstone, limestone, marble, or other stone or minerals to the said intended canal and collateral cuts, over the lands or grounds of any person or persons, then, and in every such case, it should be lawful for him, her or them to make any such railways or roads, he, she or they first paying or tendering satisfaction for the damages to be thereby occasioned to such lands or grounds, in manner therein directed with respect to land to be taken for the purposes of the now stating act; and that it should also be lawful for the owner or owners of, and person or persons interested in, such lands or grounds, to treat and agree with any such proprietor, renter, lessee or occupier, for the damage to be done to such lands or grounds by making any such railway or roads," etc. And by the 57th section it was further enacted, "That it should be lawful for the proprietor or proprietors of any lands or grounds, or of any mines of coal, ironstone, limestone, or other minerals, to make any navigable cut or cuts through his, her, or their own lands, in such manner as he, she, or they should think proper, to communicate with the said intended canal or collateral cuts, or any of them." And by the 58th section of the said act, after reciting that it was reasonable that the several owners and occupiers of coal mines within the parishes of Bilborough, Broxtowe, Nut-hall and Basford, and the neighborhood thereof, being situate near the said intended canal, should have a free communica-

tion between their said coal mines and the said intended canal, and reciting that such communication might be effected by making a navigable cut from the said intended canal, in the parish of Wallaton, through the lands of Henry Lord Middleton, into the parish of Bilborough, and that the said Henry Lord Middleton was consenting that such cut should be made through his lands, it was, therefore, enacted that it should be lawful for the owners or occupiers of any mines of coal within the parishes or hamlets of Bilborough, Nuthall and Basford, or any of them, at his or their own expense, to make a navigable cut from and to communicate with the said intended canal, at the east end of the summit level thereof, in as direct a line as might be through the lands of the said Henry Lord Middleton, to the said parish of Bilborough, to or near to a certain fence within the said parish therein described, and also to make a proper towing-path on the side of such cut; the person or persons who should make such cut making satisfaction for the damage to be thereby occasioned to the lands of the said Lord Middleton, his heirs or assigns, in the manner by that act directed, and that such cut should be public and open to all persons for the conveyance of any goods, wares, or other things in boats and other vessels, upon payment to the person or persons at whose charge and expense such cut should have been made, his, her, or their heirs, executors, administrators or assigns, of such sum of money in gross or such yearly rent as the said commissioners should judge reasonable on account of the expenses of making and maintaining such cut, and that the owners or occupiers of any mines of coal should have the like powers and authorities for making any railway from any such mines of coal to the north end of the cut to be made to the said parish of Bilborough as aforesaid, as they were or should be entitled to by virtue of that act for making railways to the said canal and collateral cuts.

The canal mentioned in the said act of parliament was completed by the said Nottingham Canal Company, under the powers of the said act, in about two years after the passing thereof, and about 1798 and 1799 the cut mentioned and provided for by the 58th section was made, and is now called the Bilborough Cut.

The defendants are local masters and coal owners, trading

in co-partnership together, and are joint proprietors, renters, lessees or occupiers of certain collieries, situate in the parishes of Shelley, Nuthall and Basford, respectively, and of certain collieries situate at Babbington, called the Babbington Collieries. Some years since, by virtue of the said Nottingham Canal Act, a railway was made by one Gervase Bourne, who preceded the defendants in the occupation of the said Babbington Collieries, from the said Babbington Collieries to the said Nottingham Canal, which railway still subsists, and is used by the defendants to convey coals and minerals to the said Nottingham Canal, and by the canal to Nottingham. The defendants, some time since, with the consent of the owners of the lands, made a certain other railway, communicating with the railway before mentioned at the Babbington Collieries, and passing through the parishes of Bilborough and Nuthall to a place called Cinder Hill, and a junction with such last mentioned railway has been formed by the said defendants at Cinder Hill, by means of a railway made to communicate with a certain intended colliery, called the Nuthall Colliery.

The defendants intend to obtain and raise coals and other minerals from the said Nuthall Colliery, and they propose forming a railway fitted for the use of locomotive steam engines, from their said colliery through the parishes of Basford, etc., to join the said Nottingham Canal.

The plaintiffs are the owners of certain lands lying in the line of the proposed railway, and they are not consenting to have their said lands crossed by or used for the purposes of such proposed railway.

A railway from the Nuthall Colliery to the north end of the Bilborough Cnt would not pass through any lands belonging to the plaintiffs.

The questions for the opinion of the court are, first, whether the defendants have a right to make a railway over the said plaintiff's land under the provisions of the said act; secondly, whether they have a right to make a railway over the plaintiff's land for the purpose of being traversed by locomotive engines.

The points marked for argument on the part of the plaintiffs were the negative of the question proposed. The defend-

ants' points were, that they were empowered by the 54th section of the Canal Act to make a railway from their Nuthall Colliery to the canal. That the act having given the power to make railways generally, without any restriction as to their construction, or as to the mode in which they are to be used, the defendants have a right to make them for the purpose of being traversed by locomotive engines. That at all events there can be no legal objection to the defendants so constructing their railway as that it may admit of being traversed by locomotive engines, as well as by animal power. That if the use of locomotive engines would be injurious to the plaintiffs, the time to object to the use of them will be when the defendants begin to use them.

WHITEHURST, for the plaintiffs.

The power given by this act is not a continuing power, but is confined to those persons who were the proprietors and owners then existing, or who might have been existing during the progress of the making of the canal, and therefore the defendants do not fall within its provisions, and have no authority to make this railway. It was limited to persons who were interested in the mines and estates in those days, who were well known, and whose consent was probably obtained to the passing of the act, or who must be taken to have assented to it because they did not oppose it. But it never could be intended that persons who at the time had no interest in the mines at all, and who did not know of the act or its provisions, should be allowed to take the lands of the owners for any such purposes as they might thereafter require. This being a private act of parliament, ought to be construed strictly as against individuals claiming to derive powers under it, and more favorably as regards the public: 2 Darris on Statutes, 688. Acts of parliament of this description are to be considered as mere private bargains with the legislature, and their provisions ought not to be extended beyond their fair and obvious meaning. (ALDERSON, B.—There is nothing new to show that this is an unreasonable exercise of the power.) It is submitted that the defendants have no right to make this railway, for several reasons: First, they have already made one railway to the canal under the power given by the act; and having exercised that power

they can not abandon that railway and make others. They may have the power to make one railway, but not an infinite number of railways. The power can not be extended beyond the express terms of it. Having once selected a particular line, they can not abandon that at pleasure, and make other railways from place to place. Again, they can not make the railway as proposed, for by the 58th section they are bound to make it to the north end of the Bilborough Cut. This colliery is situated in Nuthall, and the legislature seem to have thought that the owners and occupiers of mines there ought to be bound to use the Bilborough Cut.

Secondly, the defendants are not authorized to make a railway which requires locomotive engines. The power to use such railways was not contemplated at the time of the passing of this act in 1792. The laying down of such railways as were then in existence was very different from what would be required for locomotive engines. (PARKE, B.—Was not this matter decided by *Dand v. Kingscote*, 6 M. & W. 174?—Not that you might use locomotive engines; but it was held that the authority was not necessarily limited to such ways as were in use at the time of the grant.) Though the point was raised, it was not decided whether, under the reservation of a sufficient wayleave, the coal owner had a right to make a railway with cuttings and embankments, and fenced in so as to exclude the owner of the soil. In 1792, before locomotive engines were known, the railway was nothing more than two pieces of iron or wood laid on the surface of the land, without cuttings or embankments, and the right to make the railway gave no privilege or right to make cuttings or embankments. It was, in truth, nothing more than a tram road, with the right of going upon the road so laid down, the carriage being drawn by horses, and it was not necessary to make it upon a flat surface; and this consequence followed, that the owner was not excluded from the occupation of the land, but traversed over his close as if no railway existed. The privilege of making such a railway would not authorize the defendants in making the one they contemplate. (PARKE, B.—The parliamentary power is to make any railway; it does not say, such as are now made, but any railway. If the act be held to give the defendants the power of running locomotive engines, it of ne-

cessity would exclude the owners of land from traversing these roads altogether, and the defendants must have exclusive possession of the land occupied by the railway, which never could have been the intention of the legislature. The parties are not empowered by the act to take the land, but only to make roads over the land or grounds of any person or persons—and a power is given to meet and agree with the proprietors or lessees for the damages to be occasioned by such railway, and if they can not agree, then it is to be settled and ascertained by commissioners as therein mentioned. It never was intended to give them any power to take the land; they merely were to have a right of road, and having that, it was not intended to give them the power of raising an embankment and excluding the owners from the land, which it would be necessary to do for the purpose of constructing and using the contemplated land.)

HUMFREY, *contra*, was stopped by the court.

PARKE, B.—I think the defendants in this case have a right to make the proposed road for carrying coals by any reasonable means, provided it does not create a nuisance. The power given by the act is to make any railway; and it is not shown that the term railway has any definite meaning, requiring it to be made on the level; and I can not think that it can be qualified by showing that, at the time of the passing of the act, a particular species of railway, unlike the one contemplated, was in use. The power is general, to make railways over the lands or grounds of any person or persons, making satisfaction for the damages to be occasioned thereby. The railroad in question must, however, be properly adapted to the purpose, and reasonable care must be taken that it does not become a nuisance to the public or individuals.

ALDERSON, B.—Subject to that restriction, the defendants are entitled to make any road embracing the last improvements that are in existence at the time they make the road.

ROLFE, B., concurred.

The following certificate was afterward sent:

First. We have heard the cause argued by counsel, and have considered the same, and are of opinion that the defendants have a right to make a railway over the plaintiffs' land under the provisions of the act of parliament mentioned in this case.

Secondly. We are of opinion that the defendants have a right to make such a railway over the plaintiffs' land, properly constructed for the purpose of being traversed by such locomotive engines, if any, as can be used for the purposes in the act mentioned without occasioning any public or private nuisance. Dated this second day of May, 1843.

J. PARKE,
E. H. ALDERSON,
R. M. ROLFE.

PROUD V. BATES.

(34 L. J. Ch., 406, Before the Vice Chancellor, 1865.)

Carriage of foreign minerals. A lease of waste land of a manor contained a reservation to the lessor of the mines and quarries, with full power to win and work the same with free way leave and passage to, from and along the same, on foot or on horseback, with all manner of carriage and a covenant by the lessor that in working the mines he would do as slight damage as possible to the soil, etc.: *Held*, that the lessor and those claiming under him were entitled not merely to a right of way for the purpose of working the reserved minerals, but to an absolute way leave which might rightfully be used for the purpose of working minerals not under the demised property.

In every grant of mines there is an implied reserve of surface support which is not to be taken away by the construction to such result of general covenants as to mode of working them.

Surface support not affected by reservation and way leave. Though a lease reserves to the lessor the minerals with way leave so extensive that it allows the carriage of minerals not under the demised property, it does not deprive the lessee of the right of support to the surface of the land as incident to the demise.

In this case two questions were raised on the construction of a lease which contained a reservation of mines.

The first question was as to the right of the tenant of the surface to support; the second as to the right of the lessee of the mines to use a drift way under the property for the purpose of working mines not lying under the property in question.

The circumstances were as follows:

By a deed dated the 1st of July, 1745, in consideration that William Darnell agreed to release to William Belasyse all claim to the waste or common within the manor of Brancepeth, and all right and privilege of common in the same manor, and for a nominal rent, the said W. Belasyse demised to W. Darnell certain lands then lately inclosed there by the said W. Darnell from the waste, and containing about ninety two acres, for a term of 1,000 years. The deed contained the following reservation and provisions as to the mines:

"The mines and quarries lying and being within and under the same, with full power and free liberty and power to sink for, win and work the same, with pit-room and heap-room for the same, and with all liberties, privileges and conveniences necessary and convenient for the winning, working and management thereof (the said W. Belasyse paying to the said W. Darnell the sum of 13*s.* 4*d.* for every coal-pit which he or they shall sink within the said demised premises), (and saving and reserving full and free liberty and authority for the said W. Darnell to dig and take stones from and out of the quarries within the said demised premises, for the building or repairing of his or their houses, buildings or walls within the said manor to be built, repaired or erected), with free wayleave and passage to, from and along the same, on foot or on horseback, with all manner of carriages, always excepted and reserved unto the said W. Belasyse."

The deed contained a covenant by W. Darnell that it should be lawful for W. Belasyse during the term peaceably and quietly to cut, dig, sink, win, work, take, lead and carry away "the said mines and quarries" in and from the demised premises aforesaid, with all liberties and privileges thereunto belonging, at the will and pleasure of the said W. Belasyse; and also a covenant by W. Belasyse that he, in the winning and working the collieries within the said demised premises, and in the leading away the coals from the same, and in the using

the other liberties and privileges excepted and reserved to W. Belasyse, would do as little damage and spoil to the soil and herbage of the premises demised as he and they could conveniently make or do.

By another deed of the same date, and containing similar provisions, exceptions and reservations, other lands in the manor adjoining those demised to Darnell, were demised to Thomas Rippon for 1,000 years.

In 1861 the whole of the lands comprised in the demise to Darnell, and part of the land comprised in the demise to Rippon, became vested in William Proud, for the residue of the terms of 1,000 years, and these constituted one farm known as South Shields.

The lessees of the mines and minerals under South Shields in 1861 commenced working a seam of coal known as the main seam, lying about twenty two fathoms below the surface of the farm.

In November, 1862, the surface of the ground under which such mining had been carried on began to crack and subside, and it was discovered that the working of the coal under the South Shields farm, and under the lands adjacent, was commenced by leaving walls or pillars of coal sufficient for the support of the superstrata and surface, and only working and removing the coal from the spaces between such walls or pillars, but that in the autumn of 1862 the lessees of the mines commenced removing the pillars of coal so left, without leaving any support for the surface.

In June, 1863, the subsidence had increased so much as to destroy the drainage of a field called Low Well field, and to injure a road and new fence wall upon South Shields farm and on the 8th of June, 1863, W. Proud commenced an action for damages in the court of exchequer against the lessees of the mines. In July, 1863, an arrangement was made for staying further proceedings in this action, upon the terms of the defendants paying the amount of the damage, such amount to be settled by arbitration. The arbitrator by his award, dated the 2d of November, 1863, found that at the commencement of the action W. Proud had sustained damages to the amount of £49 5s., by reason of the acts complained of in the declaration in the said action, and which sum of £49 5s. com-

prised the sum of £39 15*s.* being as and for the then present damages to the said land and wall, and the sum of £9 10*s.* as and for the prospective damages in respect of the same premises; and he directed the defendants to pay to the plaintiff the said sum of £49 5*s.*

On the 22d of September, 1863, before the award had been made, the solicitors of the plaintiff wrote to the solicitors of the defendants as follows:

“Our client has no means of knowing whether the defendants are working this mine or not. All that he knows is that his land is being let down from time to time. It may be that the defendants are not now doing further injury, and that the falls referred to are the result of the previous operations; but there is nothing to prevent your client’s recommencing the removal of the remaining support to-morrow, and our client would have no means of knowing when to seek the aid of a court of equity to restrain them. Will the defendants give a written undertaking not to interfere with that portion of the mine without giving our client a month’s previous notice?”

No answer was returned to this letter, and the award was made as above mentioned; but during the proceedings in the action and arbitration, W. Proud ascertained that the defendants, who were the lessees of the coal under certain land belonging to Messrs. Burrell, near to South Shields farm, had for some time been in the constant practice of carrying the coal worked by them under Messrs. Burrells’ land along the drifts and tramways made by them under South Shields farm without his permission and without paying him any way-leave rent, and that the lessees of the mines made and used certain air and water-courses under Proud’s farm, for the purpose of ventilating and draining their adjoining mines, without obtaining Proud’s permission or paying him rent.

Further subsidence took place in December, 1863; and after considerable correspondence on the subject, in the course of which the lessees of the mines offered to compensate Proud for any subsidence caused by mining works subsequent to the award, W. Proud filed a bill against the lessees of the mines, by which he alleged that the sum awarded by the arbitrator covered only the damage caused by the workings of the defendants under one close of the plaintiff’s farm, viz., the Low

Well field, and that the defendants threatened and intended to continue their workings under the whole of his farm, without leaving proper support for the surface; that the defendants had worked the coal under fifteen acres of his farm, leaving proper supports which they threatened to remove; that he was, under the before mentioned leases, owner of the sub-soil as well as the surface, for the residue of the terms vested in him, subject only to the above mentioned reservation to the grantor; and that those reservations were not intended to reserve, and did not reserve, any general right in the sub-soil, and did not authorize W. Belasyse, or persons claiming the benefit thereof through him, to make or use any drifts or passages under the plaintiff's farm for any purpose other than the working or taking away the coal or other materials worked by them under the plaintiff's farm.

The bill prayed an account of the foreign coal carried and the award of damages for way-leave thereon, and for an injunction against its further carriage, and against further working such as would cause subsidence, and an award for damages suffered and anticipated.

It appeared from the evidence that the coal had been worked according to the custom of the country, and that the drifts and passages were all made in the main seam coal; but in the principal drift, in order to afford sufficient height for horses to pass along it, the rock above the coal had been cut away to the extent of about one foot six inches.

Mr. WILLCOCK, Mr. ROLT and Mr. FABER, for the plaintiff.

Sir HUGH CAIRNS and Mr. DICKINSON, for the defendants.

WOOD, V. C.

The questions that arise on this bill are two; and although very distinct, both arise under the same demise for the term for 1,000 years of surface land made to the plaintiff, Mr. Proud. It appears that those who preceded him in title, in the year 1745, took two leases of that date of the then lord of the manor of Brancepeth. They were originally tenants of the manor in some form or other, and they had enclosed certain

lands which the lord claimed; and in consideration of their giving up all right to any other lands than those he demises to them (which, of course, would be abundant consideration), and for a nominal rent, a large tract of land was in each case demised in the form stated in this bill, and the form of the demise raises two questions; firstly, as to what right the defendants have to the use of any portion of the underground property as a right of way; and, secondly, as to what right they have to work the mines in such manner as to occasion damage to the surface owner.

I will deal with the question as to the way-leave in the first instance. What has happened is this: The mines have been worked, and a way has been cut in the proper working of the mines along the coal seam; but the coal seam, not having been high enough for the passage of carriages and horses, a height of one foot six inches has been cut in the solid stone above the roof of the mine so as to allow a horse to pass, and the question is, whether under the terms of this lease the lessee, and those that follow him, are entitled to have the use of this way for their underground workings, other than the mines under the demised property, without paying a royalty by way of way-leave to the lessee of the land and those who represent him. Now, the exception is peculiar, but I do not think there is really any substantial difficulty on the whole construction of the lease, looking at the circumstances attendant upon it and seeing what it is the lessor has reserved. He is lord of the manor, and he makes two leases of this kind; he at the time is owner of all the mines, as lord of the manor, and he excepts out of this demise, as he excepted out of the next demise, the whole of the mines. And upon that word "mines" there can be no question; it can not be less than the minerals which the mines contain. Whether the word "mines" be used in the sense of minerals, the thing dug out of the mines, or that which contains the minerals,—that which contains can not be less than the thing contained; and, therefore, there is no doubt that the whole containing chamber which has the minerals is the mine; and, so far as the mines are concerned, there is no question that they are altogether out of the demise. And as regards any right of using the mines, they never having been demised at all or parted with, the defendants are, of course, at liberty to use them as they may think fit; and the case of

Bowser v. Maclean completely explains what the right view is. Lord Campbell says, with regard to copyholds, the copyholder has the whole right demised to him; the whole right is in him, but subject to the right of the lord to work the mines. The copyholder is owner, and the lord can not use an underground way for the purpose of passing through any of the copyhold premises; but as regards that which is excepted out of the demise by contract, of course the owner can use whatever he excepts just in any way he may think fit; and as regards that part of the case, I should never have had a moment's hesitation or doubt.

The only point that can raise the question is that small point about the headway of a foot and a half for the use of horses and carriages; and the question is, whether the plaintiff is entitled to demand a way-leave in respect to that. That any such intent existed is, perhaps, absurd to suppose. We must collect the intent from the instrument, and the instrument alone. I can not quite follow the argument of Sir Hugh Cairns when he says that a way-leave and right of way are excepted. I do not think anything can be excepted out of a demise except that which is part of the property itself. It is not a right issuing out of the property which can be excepted. You either demise or not the whole of the property. If you do demise the whole property and except anything, then it is by way of re-grant, as in the case of hawking or hunting, which was very much discussed in two cases in which all the learning on the subject is collected—the one *Wickham v. Hawker*, 7 M. & W. 63, and the other, *Doe v. Lock*, 2 Ad. & E. 705, 743; and, therefore, I apprehend, that so far this must be considered not to be a reservation of the whole ownership in that sense, but a grant, as it were, to be taken out of the property demised; and the question is, what is the extent of that grant which the landlord has so insisted on—a grant merely for the purpose of working those particular mines, or has he insisted on a grant giving him an absolute right to this user for any purpose whatsoever? There is no limitation whatever; and furthermore, there is this, that the first exception of the mines would give him the restricted right of working those mines. The exception of mines themselves would carry that right without any other words whatsoever. That is determined in that case of *Lord Cardigan v. Armitage*, 2

B. & C. 197, where it was held that where you once reserve mines you reserve everything that is necessary for working them, of course including the way-leave for carrying away the minerals, and especially, finding, as I do here, the words "the right of winning, working," and so forth. That is, therefore, one ground for supposing that when the reservation was expressed, as it is here expressed, it was not intended to be restricted to the limited right.

But, further than that, you have the circumstances of the grant. The lessor was entitled to the property in the whole manor, of which this is part; and if you look at the probable intent and purpose of the parties, it confirms and strengthens the view that what is expressed to be absolute here is meant to be absolute, and that the lessor has reserved to himself the full, complete and absolute right of going through this property with carriages and horses for any purpose whatever, and for any unlimited object he may think fit. I think, therefore, as to that part of the case, I must dismiss the bill, and dismiss it with costs.

Then, as to the other part of the case, viz., the right of the lessor so to work these mines which are reserved as to let down the soil. I think that is governed by the authorities which I have referred to, followed by *Dugdale v. Robertson*, and that the cause comes to this: whenever a person demises a surface, *prima facie*, he is intending to uphold the surface in order that he may not derogate from his own grant. He is not to do any act whatever which will let that surface down, and although he reserves to himself the mines, and although he reserves all liberties and privileges of working them, he does not include the right of so working them as to let the surface down. That is a right which the surface lessee has obtained for himself, and will not be deprived of by mere implication arising on the points to be conjectured here and there from the case; but you must have a plain and clear and distinct indication of the intent. In *Rowbotham v. Wilson*, the words showed that it was expected that the surface would be broken and would go down; and yet even in that case some of the learned judges were of opinion that the law was so strong that even with a reservation of that sort the surface ought to be upheld. The House of Lords thought otherwise, and one can not be surprised at their coming to a contrary

conclusion with such precise words. Here the words are only that Belasyse and his assigns are to be at liberty to "cut, dig, sink, win, work, take, lead and carry away the mines and quarries in and from the demised premises, with all liberties and privileges thereunto belonging." That was said to give him the right of carrying away everything, whatever might be the consequence. I think that, standing alone, could have no such effect.

Then comes the other clause which had been relied on, that he, William Belasyse, in leading away the coal, would do as little damage and spoil to the soil as he could conveniently make or do. I do not think that which is a restrictive clause, restricting the right of the lessor, can be raised into an implication enabling him to deny that privilege which he has conferred, namely, the surface in its existing state to be used in its existing state, with all the benefits that every surface owner has, unless he has distinctly, by a contract, deprived himself of this right.

The case before me of *Dugdale v. Robertson*, had exactly the same sort of clause as here, and the other cases which are relied on there had stronger clauses still; and I must follow the course which I there adopted.

Now, as to the question whether or not there has been any letting down, there seems to be some little dispute on the evidence; but that would not prevent the plaintiff having his decree. There is a distinct assertion of the right. It is doubtful whether he has been let down or not. But the defendant, on the other hand, says, if I have let you down, I am entitled to let you down, unless the court shall decide the contrary; which means that they wish to have the question determined by the court, and when the court has determined the question, they will act accordingly.

I think what must be done in this: Dismiss the bill, with costs, so far as regards the two first paragraphs of the prayer of the bill; then I must grant an injunction in the terms of the third paragraph; and direct an inquiry whether the plaintiff has sustained any and what damage in respect of the working of the defendants other than that which has been compensated for by the award. The defendants will pay the costs of that part of the suit, and then one set of costs can be set off against the other.

HOBART, Respondent, v. FORD, Appellant.

(6 Nevada, 77. Supreme Court, 1870.)

Carelessness in the wording of statutes commented on.

Grant of right of way to ditches. The act of Congress of July 26, 1866, clearly grants the right of way over the public land to all who may desire to construct ditches or canals for mining or agricultural purposes—after allowing for the solecisms usually found in the acts of that body.

Pleading facts under different statutes. Where a complaint states facts sufficient, under the terms of a State law or of an act of Congress on the same subject, he is entitled to the rights given by either.

¹ **Eminent domain not involved.** Under the act of Congress granting the right of way over the public land for the construction of ditches, there is no question of taking land for public uses involved, the government having absolute control over its own land.

Discretion of court as to preliminary injunctions. The granting of a preliminary writ of injunction resting very much in the discretion of the court below, the Supreme Court will not be disposed to reverse its action in a case where no answer is filed, and no defense on the merits shown.

Appeal from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

R. S. MESICK and WILLIAMS & BIXLER, for appellant.

HILLYER, WOOD & DEAL, for respondent.

By the court, LEWIS, C. J.

"Sec. 9. *And be it further enacted*, that whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, that the same are recognized and acknowledged by the local customs, laws and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the

¹ See *Broder v. Natoma Water Co.*, 4 M. R. 670.

construction of ditches and canals, for the purposes aforesaid, as hereby acknowledged and confirmed; *provided, however*, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

This section, which by its turbid style and grammatical solecisms, more surely than by the enacting clause of the act, is shown to be a production of Congress, may be found on page 253, Vol. 14, of the statutes at large. (R. S. U. S. § 2339.)

In its adoption there appear to have been three distinct objects in view: First, the confirmation of all existing water-rights; second, to grant the right of way over the public land to persons desiring to construct flumes or canals for mining or manufacturing purposes; and, third, to authorize the recovery of damage by settlers on such land, against persons constructing such ditches or canals, for injuries occasioned thereby. That this section grants the right of way over the public land to all who may desire to construct ditches or canals for mining or agricultural purposes, is about as clear and certain as the objects and purposes of the acts of Congress usually are. It is true, the most apt words to indicate this purpose are not employed. That could scarcely be expected; but the right of way for the construction being "acknowledged" and confirmed, indicates the grant of a new right, rather than the confirmation of an old one, enjoyed at the time of the passage of the act. The confirmation or recognition of existing rights seems to be the object sought to be accomplished by the first clause of the section. To hold that the second clause simply reiterates the same thing might be warranted by the practice of Congress, but not by the rules of construction which must govern the courts in the interpretation of all laws. Again, the last provision of the section strengthens the view that such right of way is granted, for it authorizes the recovery of damages by the settlers on the public land for injuries resulting from the construction of ditches and canals after the passage of the act.

It is argued, however, that the privilege thus granted is not available in this case, because: 1. The plaintiff pleads and

relies on a statute of this State for the right claimed by him; and, 2. Sufficient facts are not alleged to bring him within the act of Congress.

Undoubtedly, the plaintiff claims the right to construct his flume from the law of 1866, enacted by the State legislature, and pleads all the facts necessary to bring him within its provisions; so, also, all the facts necessary to bring him within the act of Congress are pleaded. Under that act, as we understand it, nothing is necessary to be shown except that the construction of a canal or ditch is desired for some mining or agricultural purpose, and that the land over which it is to be constructed is public. These facts are shown in the complaint alleging the building of the ditch or flume for certain mining purposes, that the land claimed by the defendant is public land; that it is necessary to construct the ditch over it, and that he unlawfully obstructs and prevents its construction over the premises claimed by him. Surely, nothing further is required. All the facts necessary to bring him within either law being pleaded, there appears to be no better reason for holding that he is confined to the rights given under the State law than that he is to those granted by the act of Congress. Being public laws, it was not necessary to refer to either of them, but only to plead the facts. This is done, and, therefore, the plaintiff is entitled to the rights given by either. There is not under this law any question of taking private property, either for a public or private use. The land claimed by Ford is public land, over which the general government has absolute control. It has, as we interpret this law, authorized any person wishing to construct a canal or ditch for mining or agricultural purposes to construct it over any public land; this claimed by Ford being public, the plaintiff has the right to pass over it with his flume.

It is not the intention here to determine whether the plaintiff has the right to divert the water or tailings from the defendant's premises. He has not answered, nor is it shown that he has the right to the water or tailings claimed by him as against the plaintiff. If he has not, then certainly the plaintiff has not only the right to construct his flume, but also to divert the water and tailings. If, however, on the other hand, the defendant has the better right, then, as a matter of

course, the plaintiff could have no right to cause the diversion of water from him. This is a question not determined in this proceeding; but the plaintiff seems to have made out a *prima facie* case by his complaint and upon the hearing of the application, to entitle him to the order made in his favor. At least, as the granting of these preliminary orders rests very much in the discretion of the court below, we would not feel authorized in reversing its action upon the showing made, especially as no answer is filed, and it is not known that any defense to the merits exists.

If Ford had the title to the land here in question, we are inclined to believe with counsel that an order of this kind, which in effect places the plaintiff in possession of a portion of it, ought not to be granted, for it would be ejecting the owner before the trial of the right. Here, however, it is admitted that the land is public; that being the case, Congress had a perfect right to grant the right of way over it. Having done so Ford has no more right to complain than a person who had never been in the possession.

Entertaining these views, we do not feel justified in reversing the preliminary injunction granted by the judge below; it is therefore affirmed.

JOHNSON, J., did not participate in the foregoing decision.

F. BLISS ET AL. V. SAMUEL KINGDOM AND JAMES KINGDOM.

(46 California, 651. Supreme Court, 1873.)

Right of way by tunnel—Statute cumulative to custom. The statute of 1870, providing for the condemnation of a right of way for ditches, flumes, tunnels, etc., over or through mining claims, is cumulative and does not prevent the enforcement of a similar right where existing by virtue of the local customs of miners.

Enjoining interference with tunnel. If, by the local customs, the owner of one mining claim has a right to construct a tunnel through an adjoining claim, in order to enable him to work his own claim, a court of equity may enjoin any interference with that right.

Appeal from the District Court of the Tenth Judicial District, County of Sierra.

The complaint alleged that the plaintiffs owned back claims on Poverty Hill, Sierra county, which were placer gold mining claims, and that the claims had no frontage on the face of the hill, and that the defendants owned the claims in front of and adjoining the plaintiffs' claims; that by the local customs of miners, the owners of rear claims were entitled to a right of way through the front claims for a cut or tunnel; that the plaintiffs had, at an expense of fifty thousand dollars, run a tunnel in the bed rock under defendants' claims toward their own claims, to enable them to work their claims; that the tunnel was one thousand six hundred feet long, and had reached to within thirty feet of the front line of plaintiff's claims, when it became necessary to raise a shaft to the surface for air, and such shaft was run within the line of defendant's claims, making an aperture about four feet square, and that it reached the surface at a point where defendants had worked off the pay dirt to the bed rock; that defendants prevented the plaintiffs from securing the shaft, and compelled them to leave the premises, and, by means of a hydraulic pipe, washed earth into the shaft, and excluded air from the tunnel, and that these acts were done maliciously. The plaintiffs asked that the nuisance be abated, and that the defendants be enjoined from further molesting them.

Upon the trial the defendants moved that the action be dismissed, because the statute of the State of California, passed the first day of April, 1870, entitled "An act to regulate the rights of the owners of mines," had made especial provision for cases of the kind described in said complaint; and plaintiffs having failed to apply for such remedy, could not maintain any action upon the facts alleged in their complaint.

The court sustained the motion and the plaintiffs appealed.

S. B. DAVIDSON, G. G. CLOUGH and CREED HAYMOND, for appellants.

VANCLIFF & McCANN, for respondents.

By the court, NILES, J.

The court erred in sustaining the defendants' motion to dismiss the complaint, upon the ground that the act of April 1, 1870, Stats. 1869-70, p. 569, provides a remedy which the plaintiff was bound to pursue. Without entering into an unnecessary discussion of the constitutionality of this act, it is sufficient to say that the remedy it purports to provide is merely cumulative. It is undertaken by this act to provide means by which a party may procure a right which he would not otherwise have, but it can not be construed to have the effect of excluding a party from the enforcement of a right which he claims to have independent of the statute.

The suit appears to have been dismissed solely for the reason that the plaintiff had an adequate remedy under the statute referred to. We do not think we are called upon to decide whether the complaint is defective in other respects or not, especially as we have not been favored with any brief, or points and authorities, upon the part of respondent.

Judgment reversed and cause remanded for further proceedings, in accordance with this opinion.

1. Damages for stopping a way leading to colliery, a question for a jury: *Jeveson v. Moor*, 12 Mod. 262; compare s. c., 1 Ld. Ray'd 495; 1 Salk. 15; 1 Comyn. 58; Carth. 451; Holt, 10; Comb. 480.

2. While an individual or corporation owning coal lands or stone quarries may condemn a right of way thereto over the lands of another by *ad quod d'mnum* proceeding, yet the way so appropriated must be a public one: *Jones v. Mahaska County Coal Co.*, 47 Iowa, 35.

3. Reservation of way-leave construed: *Dand v. Kingscote*, 6 M. & W. 174.

4. Lease of mines containing a grant of right of way to carry coal: *Held*, not to be confined to the right of carriage from the particular mines leased: *Bidder v. North S. R. Co.*, L. R. 4, Q. B. Div. 412.

5. A gift of right of way is not a gift of the minerals contained in the ground: *Smith v. City of Rome*, 7 M. R. 308.

6. Grant of a free and convenient way for the purpose of carrying coals, construed: *Senhouse v. Christian*, 1 Term, 560.

7. Where a way is obstructed, adjoining land may be crossed: *Farnum v. Platt*, 8 M. R. 330.

8. Construction of the U. S. act, granting right of way to ditches: *Barnes v. Sabron*, 4 M. R. 673; *Broder v. Natoma Co.*, 5 M. R. 33; *Shoe-maker v. Hatch*, 13 Nev. 261.

9. Permission to exercise a right of way does not necessarily imply a

dedication; without intention to dedicate, it amounts only to a license: *Barraclough v. Johnson*, 8 Ad. & El. 99.

10. The same legal rights apply to underground as to surface right of way: *Pomeroy v. Buckeye Co.*, 37 Oh. St. 520.

11. Grant of way will be presumed as appurtenant to the land rather than as personal to the grantee: *Louisville R. R. v. Koelle*, 104 Ill. 455.

12. Right of way, in gross, is not assignable: *Id.*

13. Surroundings of parties considered in construing the grant: *Id.*

14. There may be a way for *all purposes except* carriage of coals: *Stafford v. Coyney*, 7 B. & C. 257.

15. Eminent domain not exercised in favor of ditch: *Lorenz v. Jacob*, 63 Cal. 73; see *Thorn v. Sweeney*, 7 M. R. 584.

16. Right of way for agricultural purposes does not extend to carrying produce of a quarry: *Jackson v. Stacy*, 1 Holt Eq., 455.

See EMINENT DOMAIN.

EVANS V. MYERS.

(25 Pennsylvania State, 114. Supreme Court, 1855.)

Contract presumed made with reference to statute. Where a contract was made for a given number of tons of pig metal after the passage of the act April 15, 1854, which declares that 2,000 pounds shall make one ton, the contract must be taken as made with reference to it; and it was error to allow local custom to control the statute.

Statute controls custom. Local customs can not nullify acts creating a uniform system of weights and measures.

Error to the District Court of Allegheny County.

This was an action on an agreement under seal, in which "Edmund Evans, of Clay Furnace, agrees to weigh off and deliver on the bank of the Allegheny river at said Furnace to the order of Myers & Hunter, 40 tons of pig metal at \$20 per ton."

The breach alleged was that the defendant has not delivered the said 40 tons, and had delivered but $34\frac{1}{2}$ tons. And defendant then offered to prove by J., "that the universal custom with dealers in all pig metal is to buy and sell by the gross ton of 2,268 pounds, and that defendant has always sold according to that weight and usage."

The defendant objected to the offer because the agreement and the act of Assembly are the legal evidence of the contract between the parties and can not be altered, changed or modified by parol evidence, or by any evidence of usage or custom; and because no evidence could be received which contradicts the act of Assembly of 1834. The court overruled the objection, admitted the evidence, reserving the question whether "if the offer should be fully made out by proof it would be sufficient to entitle the plaintiff to recover." The evidence adduced was, that for twenty-four years, the custom, both at Pittsburg and up the Allegheny river, was universal to give 2,268 pounds sand mould metal to the ton. The court instructed the jury that if they believed the evidence of the custom, and that the contract was made in view of it, they might find for the plaintiff, subject to the question reserved; to which defendant excepted. The court subsequently entered judg-

ment in favor of the plaintiff on the point reserved, to which defendant excepted.

The 17th section of the act of 15th April, 1834, makes the ton to consist of twenty hundred, avoirdupois weight.

The only question in the case was whether the custom alleged should overrule the provision of the act, where the contract was silent in this respect.

A. B. McCALMONT, for plaintiff in error.

McCANDLESS, for defendant in error.

The opinion of the court was delivered by LEWIS, C. J.

This was an action for the breach of a covenant to deliver forty tons of pig metal. If "twenty hundred pounds make a ton," the defendant had delivered before suit brought, the quantity required by his covenant. But the plaintiff claimed 2,268 pounds to the ton and the court, on proof of a custom "among those dealing in metal throughout the iron region up to the Allegheny river, where the contract was made, and where the metal was to be delivered," permitted the jury to find that the contract was for the number of pounds claimed by the plaintiff.

"Divers weights and divers measures" were found to be "an abomination" in the days of Solomon: Prov. xx: 10. "One greater to buy, and another less to sell" was an evil resulting so naturally from the absence of a statute regulation on the subject, that it was one of the provisions of *Magna Charta* that there should be but "one weight and one measure throughout the realm of England:" 8 Evans British Statutes, 306. The pertinacity with which the statutes on this subject were disregarded in England produced repeated prohibitions and regulations, from the reign of Henry III to that of George III, with a view to guard the people against defective and uncertain weights and measures. The example of evasion in England is an abomination to us. Like all other evil customs, it ought to be abolished. It is "more honored in the breach than in the observance." Considering the commercial spirit of the age, it is of great importance to guard against fraudulent practices, and to furnish a standard of weight and measure which shall be uniform throughout the

State, and which shall be binding upon all men within our jurisdiction. If every section of the country may have its own weights and measures, to be established by its own customs, strangers would be entrapped into liabilities which they never intended to incur, and no one could know with precision the extent of his obligations. Such customs would frequently depend upon the opinions of witnesses and juries drawn from sections of the country inhabited chiefly by the parties who had an interest in establishing them in a particular way. Uncertainty would produce constant litigation, and the substance of industrious and enterprising men would be wasted in unprofitable controversies, instead of being employed for the advancement of their own interest and the general welfare of the country.

The act of 15th April, 1834, expressly directs that "twenty hundreds make one ton." The contract in question was made since the enactment of that law, and must be intended to have been agreed to with reference to it. The act of Assembly entered into the contract and formed an essential part of it. The contract was in writing, and it was the duty of the court to give it a construction. A custom may be abolished by an act of Assembly, and it was the purpose of the act to produce that result in this case. The sound policy which dictated it can not be doubted. It is a statute which ought to be enforced, and the local customs up the Allegheny river are certainly insufficient to repeal it: *Noble v. Durell*, 3 T. R. 271; *St. Cross v. Howard*, 6 Term R. 338; *Paull v. Lewis*, 4 Watts, 402. It was an error to admit the evidence of custom to control the statute, and to permit the jury on such evidence to find the contract to be different from its legal import. It was also an error to sustain the action of the jury by rendering judgment for the plaintiff below on the point reserved.

Judgment reversed, and judgment for the plaintiff in error non obstante verdicto, with the costs of suit.

WILLIAMS V. SUMMERS ET AL.

(45 Indiana, 532. Supreme Court, 1874.)

Lessee confined to screen in use at date of lease. Where a mining lease provided that the lessees should pay a certain sum per bushel "for all screened coal," and at the time of the lease there was but one screen in use at the mine leased, and but one screen in common use in other mines in the locality, and afterward the lessees placed over the screen then in use a second screen, with larger meshes; *Held*: that the parties must be held to have contracted with reference to the state of things existing at the time the lease was made; that the words "screened coal" meant such coal as passed over the single screen then in use; and that the lessees must pay the price stipulated for all the coal that passed over the lower as well as the upper screen.

Screened coal, nut coal and slack defined.

From the Owen Common Pleas.

G. A. KNIGHT, for appellant.

W. W. CARTER, S. D. COFFEE, D. E. WILLIAMSON and A. DAGGY, for appellees.

DOWNNEY, C. J.

The action in this case was brought by the appellant against the appellees, and there was judgment for the defendants. The main question in the case is the proper construction of a mining lease, dated February 13, 1869, held by the defendants from the plaintiff, who was the owner of the land. There is nothing peculiar in the lease. The clause in question is this: "And said grantees agree, in consideration of the above and foregoing covenants, to pay to the said Nathan Williams three fourths of one cent per bushel for all screened coal that said grantees may remove from said land."

It appears from the evidence that the defendants now use two screens, the first, or upper one, catching the coarse coal, and the second, or lower one, catching the fine coal. The

defendants contend that they are only chargeable with the agreed price for the coal which is caught by the first, or upper screen, and that they may carry away and appropriate to their own use the coal which is caught by the second, or lower screen, without paying anything therefor. The controversy is wholly as to this latter quality of coal. The court permitted the defendants to introduce evidence to show what was understood, among coal miners and dealers in coal, by the words "screened coal." No question is presented under the special finding. It does not appear to have been made at the request of the parties or any of them. We will consider the case upon the questions arising under the motion for a new trial.

The lease was originally given to Teter and Samuel S. Williams, and the defendants succeeded them as their assignees. The plaintiff testified that at the time the defendants took possession, and before that time, there was but one screen used at said mine for screening coal, the lessees, Teter and Williams, and lessees before them, having used but one screen for cleaning coal up to that time. The width of the meshes, or spaces between the bars of said screen, was one half inch. Shortly after defendants took possession of said premises, they remodeled the old screen, but did not materially change the width of the meshes, or spaces between the bars, but above and immediately over the old remodeled screen, they erected and put up a large screen. He found out in two or three months after defendants put up the large screen over the old screen, that they were not paying him for any coal except that caught on the upper large screen. He then demanded of them the rent or royalty on the coal caught on the under screen also, but defendants refused to pay for that coal. He insisted that he was entitled to the rent on all coal caught on the screen, or a screen of the size of the one in use when they took possession, and on which his immediate lessees, Teter and Williams, had been paying him rent. But defendants refused and claimed that they ought only to pay on the coal caught on the large upper screen, which they erected. From May, 1870, to January, 1872, the time of the commencement of this suit, the defendants have received and shipped from the premises four hundred and fifteen car loads of coal of the quality and grade

produced by the lower screen. A car load contains 300 bushels. * * * He regards the coal caught on the lower screen as the best coal in the market for many purposes. One third of all the coal dug and mined at the premises is caught on the under screen. * * * He calls the coal caught on the large upper screen, "coarse lump, or grate coal," and that caught on the lower screen, under the present arrangement, "nut coal." Both grades are "screened coal." Both grades were caught on the lower screen, and he got pay for them when only the one screen was used. He called the coal caught on and passing over the screen, "screened coal." He now called both these grades "screened coal," one grade, the product of the large screen, he called "screened grate coal," and the other "screened nut coal."

William R. Smith testified that he made the large screen used by the defendants; that the spaces between the bars are seven eighths of an inch at the top, and one and an eighth inch at the bottom; that he had since measured them and found that they were one and three sixteenths of an inch apart all the way down uniformly.

Joshua Cole testified that the spaces between the bars of the large upper screen were found on measurement by him a few days ago to be, in some places, one and a quarter inches, but across the upper and lower middle they measured one and three sixteenths of an inch; that such were the average spaces. Some pretty large pieces of coal fall through the upper screen and are caught on the lower screen. The second screen produces "nut coal," and the upper "grate coal." He has had some experience in working about coal mines. This witness exhibited some specimens of coal that were held up edgewise and dropped between the bars of the upper screen. They were from one inch to three and four in length, and three or four inches wide.

Nathan J. Williams was interested in working the mine in question before the lease of it to Teter and Samuel S. Williams. While he worked it they used only one screen, and that was the same size between the bars as the screen now used by defendants as the under or lower screen. The size of the screen used by witness was one half inch at the upper end. They used but one screen and produced only one

grade of coal. They had no screen separating the nut coal from the coarse coal, but caught both kinds together in the same screen. This same screen was used by Teter and Samuel S. Williams until they sold to the defendants. Shortly after the defendants took possession they put up an additional screen over the old screen, much larger and wider between the bars. The under screen now used by the defendants is the same sized screen as the old one. The coal caught in the large upper screen is "coarse" or "grate coal," that caught in the lower is "nut coal;" has had some experience in the coal business. About one third of the coal mined at this mine is caught in the lower screen; that which falls through to the ground is called "slack." It is the dust, sulphur, clay, etc., separated from the coal.

Samuel S. Williams, is one of the parties to whom the lease in question was made, they had but one screen, one half inch at the top and three fourths of an inch at the bottom between bars. The defendants remodelled this screen, but left the spaces the same, and put over it a larger screen with spaces twice as large as the other. The spaces in it are one and three sixteenth inch wide. One third, at least, of the coal falls through the upper screen, and is caught by the lower screen. By this arrangement, the defendants make two grades of screened coal. That which is caught on the upper screen is called "coarse," "grate," or "lump coal;" that which is caught on the lower screen is called "nut coal;" and that which falls to the ground is called "slack," for which he knows of no regular market. Where only the lower screen was used the coarse and the nut coal passed over together. The defendants now make one car load of nut coal to every two or two and a half of coarse coal. He calls that slack which passes through both screens to the ground; he knows the under screen now used by the defendants is the same size as that used by him; he knew that the defendants refused to pay the plaintiff for the coal which was caught on the lower screen; he calls both grades of coal "screened coal." The nut coal for many purposes is as good as the other.

This was the plaintiff's evidence. The defendant leased, and it was conceded by the plaintiff that he had transferred to another, one fourth of one cent per bushel, or one third of

the royalty or rent reserved by the lease, so that he was only entitled to one half of one cent per bushel.

Joseph Summers testified that he was one of the defendants. The old screen was one half inch round rods; does not know the width of the spaces; the large screen is six by three feet; the meshes, when it was put in, were seven eighths of an inch wide at the bottom, and three fourths of an inch at the top, but he was not certain as to the size; since then they had enlarged it to seven eighths of an inch all the way between the bars. The lower or under screen is one half inch wide between the bars, and it is right under the upper screen; when they took possession there was but one screen; the coal is bituminous; has been engaged in coal operations since 1860 or 1861; screened coal means grate or screened coal; to get coal for market, it takes a screen from seven eighths to one inch mesh, from seven to eight feet long, and from three to three and a half feet wide. They used two screens, one to get nut coal, which runs over a second screen. In 1869, there were two banks in that locality using two screens, the second screen was not in general use at that time. Slack sells at from five to sixteen dollars per car load, coarse coal from seventeen dollars and fifty cents to twenty dollars, and nut coal from eight to nine dollars per car load. After he took possession, there was a change made in the mode of screening. Formerly it was screened in the bank; now by the second screen. The meshes ought not to be less than an inch to make good coal; the usual screen is seven eighths mesh. The plaintiff was back and forth while the changes were being made at the bank; he said to witness it was a good job and was being put up in good shape; they had settlements monthly and nothing was said about nut coal for six months. He talked about making another company pay him for nut coal; does not know how much nut coal was shipped; thinks one fourth of all the coal is nut coal; one third goes to nut and slack. We only pay the miners for the coal run over the upper screen, and not for the nut coal. He did not know the usual size of the meshes of screens; did not say that there was any established size; every man makes his own screen according to his own notion as to width of meshes. I have seen the screens at six or eight mines.

B. F. Williams described the screens used by the defend-

ants, and stated that the words "screened coal" meant that coal which passed over the first or upper screen. This witness was also allowed, over the objection of the plaintiff, to testify that he had measured the screens then in use in that locality, with the view of determining the width of the meshes, and after referring to his memorandum book, stated the average width at seven eighths of an inch and one sixteenth of an inch added thereto. The screens at different banks vary from one inch and an eighth to seven eighths of an inch in width. He did not know of any established rule in that locality for the meshes of screens; his only knowledge was from measuring screens with reference to his evidence on this trial. He had been in the coal business for a number of years.

John Andrews had mined coal for thirty-five years, and dealt in coal in Scotland, and in this country for nine years, in Clay and Vigo counties, in bituminous coal, and knew the universally accepted meaning of the term screened coal. It is the large coal sifted from the small and dirt. The operators began using the second screen about three years ago. It is only used once in a while now. He was acquainted with the customary width of meshes of screens; they are one inch and less; he did not know of any uniform rule among miners as to the width of meshes. It is nine years since he worked in bituminous coal. A nut coal screen has one half inch meshes; did not know of any established rule as to the meaning of the words screened coal at the date of the lease in this case.

A. B. Ashley, who had no knowledge of the size of meshes of screens until after the date of the lease, was allowed to prove the width of meshes in screens in use in 1870 and afterward, over the objection of the plaintiff. He says by screened coal is meant large coal, screened from small and slack. The slack is small coal and dirt. Screened slack produces "nut coal." They make five cars of coarse coal to one of slack, or that which falls through the first screen.

W. M. Morris came to this country in 1851; has mined coal in Ohio, Indiana and Illinois; has lived in Clay county since 1868; he never was in the bituminous coal region at Highland; knew the usual size of screens in Ohio for this kind of coal. Each mine regulated the size of the mesh

according to the cars used in the banks; screened coal is universally understood to mean coarse or merchantable coal, and that which passes over the first screen; slack is what falls through; nut coal is what is caught on the second screen; has had no experience in Clay county bituminous coal.

B. F. Masten: "Screened coal" is that which passes over the first or upper screen; that which passes over the second screen is "nut coal" or "screened slack." These were the meanings of the terms in 1869. This witness was also allowed to state, over the objection of the plaintiff, that when miners are employed to dig by the ton they were paid only for "screened coal." If there is no upper screen, the coal caught on the one screen is "steam coal;" only know of two mines using two screens in 1869, all others used but one.

Joseph Carmichael testified, that when only one screen was used, he called the coal caught on it "screened coal;" called the coal caught on the lower screen "screened nut coal."

Farmer James: Screened coal is where the slack is taken out; does not know of any established rule as to width of spaces between the bars of coal screens.

John M. Bailey: There is no uniform rule for spaces between the bars of screens. In 1869 screened coal meant coal caught on upper or large screen.

Benj. Tribble: The size of screens has varied since 1869. Before 1869 they screened and raked the coal in the mine, and then ran the coal over a single screen at the top of the pit. In 1869 screened coal meant what ran over the first screen. In 1869 only two banks in all that region used two screens. All that fell through the screen was called slack. Does not know the usual size of the screens. They are not all the same size or width of mesh. They are from seven to nine feet long, three to four feet wide, and the meshes from seven eighths to one and a quarter inches wide. There is no established rule for the width of meshes. Screened coal is classified into "grate" and "nut coal."

Christian Ehrlich testified that the size of the meshes of the screen depends on the quality of coal emptied on the screen.

The defendants examined several other witnesses and read depositions of coal dealers in Indianapolis, but the facts dis-

closed by them do not essentially vary the case as made by the witnesses whose testimony we have set out.

We are of the opinion that the evidence, conceding that it was all properly admitted, fails to make out the case according to the theory of the defendants. It is shown that only one screen had been used at this mine by the first lessees of the plaintiff; that the lessees in this lease used but one screen, and that the defendants at first used but one screen. These parties all used a screen with meshes of the same size. At the time this lease was made, nearly all those engaged in mining used but one screen. It may well be inferred under these circumstances, that the parties intended to contract with reference to the state of things then and theretofore existing, and that in using the words "screened coal," they intended them to apply to such coal as was then considered and denominated screened coal, and that they meant such coal as passed over the single screen then in common use, and then and previously in use at this particular mine.

It also seems to us that there was and is no definite standard of screens for screening coal, with reference to the size of their meshes. This very clearly appears from the evidence. Even Summers, one of the defendants, testifies that "every man makes his own screen, according to his own notion as to the width of meshes;" and he had seen screens at six or eight mines. If there is no fixed and regular size for the meshes of the screens, it must follow that there is no uniformity in the size of the particles or pieces of coal forming what is called screened coal. On the subject of the validity of usage or custom and its application in the interpretation of contracts, see *Cox v. O'Riley*, 4 Ind. 368; *Harper v. Pound*, 10 Ind. 32; *Wallace v. Morgan*, 23 Ind. 399; *Biddle v. Reed*, 33 Ind. 529; *Union Railroad v. Yeager*, 34 Ind. 1; *Rafert v. Scroggins*, 40 Ind. 195.

In this particular case, it is difficult to see the justice of the position assumed by the defendants. The former lessees paid for all coal passing over the screen corresponding with the lower screen used by the defendants. Such was the case also as to the lessees mentioned in this lease. After the defendants had succeeded to the rights of the lessees, instead of paying, as their predecessors had done, they erected a coarser

screen above the one previously in use, by which from two thirds to three fourths of the coal is caught, while the former screen catches one third or one fourth of it, and they claim that they are liable to pay for only that which is caught by the coarser screen. In this way, they get, if their position can be sustained, one third or one fourth of the coal formerly paid for, without paying anything therefor. Whatever may be said about the coal now caught on the second, or old screen, it is, in fact, screened coal, as much as the other. It is a part of the coal which was caught on the screen as it was when the lease was made, and is a part of the coal caught on the screen and paid for by the lessees, the assignors of the defendants. The putting up of the new or additional screen enables the defendants to catch precisely the same coal that was caught by the single screen, but it is separated thereby into two grades or sizes. In our opinion the judgment should be reversed on the evidence.

The judgment is reversed, with costs, and the cause is remanded, with instructions to grant a new trial.

May term, 1874; Petition for rehearing denied.

1. Mode of measurement of water: *Ophir Co. v. Carpenter*, 4 M. R. 653; *Caruthers v. Pemberton*, Id. 622.

2. Oral evidence allowed to show that customary and not the statutory barrel was intended in oil contract: *Miller v. Stevens*, 100 Mass. 518; *Cullum v. Wagstaff*, 2 M. R. 573.

3. Usage to count bricks by measurement in wall, disallowed: *Sweeney v. Thomason*, 9 Lea, 359; 42 Am. R. 676.

4. Agreed number of square feet intended as a "perch" in stone contract, shown by parol: *Quarry Co. v. Clements*, 38 Ohio St. 587; 43 Am. R. 442.

5. The Illinois act of 1833 requiring collieries to keep certain scales is constitutional, but does not apply where the men are paid by the measure or by their time: *Jones v. Peo.*, 110 Ill. 590. But the amendment of 1885, forbidding contracts except by weight, is not constitutional: *Millett v. Peo.*, 117 Ill. 294.

6. Construction of stone contract where the blocks were to be paid for at a certain rate, "and one cent additional for every cubic foot" above a certain size—the various constructions of the phrase referring to one cent making a difference of \$70,745.74: *U. S. v. Granite Co.*, 105 U. S. 37.

QUARRINGTON V. ARTHUR.

(10 M. & W. 335. Court of Exchequer, 1842.)

Covenant to work undiscovered mines, when discovered, in workmanlike manner. Plaintiff demised to the defendant all mines and beds of coal, which then had been, or thereafter during the demise should be, discovered or opened under certain lands, at a yearly rent to be paid whether any coal should be worked or not, together with 7*d.* per ton for every ton raised. Defendant covenanted that he would at all times during the demise work the said mines in a proper and workmanlike manner. *Breach*, that the defendant did not work the said mines in a proper and workmanlike manner, but on the contrary, permitted the mines to lie and the same were wholly ungotten. *Plea*, that the said mines were never, at any time since or during the demise, worked or gotten, nor did he, the defendant, at any time since or during the demise, work or get the mines; *Held*, on demurrer, that inasmuch as it appeared by the pleadings that the mines had not been worked at all, the defendant was not liable on this covenant for not working them in a workmanlike manner, the subject-matter of demise being, not all the mines under the lands specified, but only such as either had been or should be discovered or opened.

Covenant. The declaration stated that by a certain indenture, bearing date the 18th day of October, 1839, made between the plaintiff of the one part, and the defendant and two other persons of the other part, the plaintiff demised to them all mines and beds of coal, ironstone, etc., which then had been or thereafter, during the continuance of the same demise, should be discovered or opened under the lands belonging to Dyffryn House; to hold the same from the 29th of September then last past, for the term of twenty-one years, at the yearly rent of £20 to be paid whether any coal, etc., should be worked or not, paying also the yearly sum of £2 for every acre of surface land taken or used by the defendant, together with the sum of 7*d.* for every ton of coal or ironstone raised; that the defendant covenanted, jointly and severally with the other persons, that he would at all times during the said demise work the said mines in a proper and workmanlike manner, according to the custom, etc. *Breach*, that the defendant did not work the said mines, veins and premises thereby demised, in and under the aforesaid land and premises called Dyffryn,

thereinbefore demised, except as aforesaid, in a proper and workmanlike manner, according to the custom, etc., but, on the contrary thereof, permitted the mines to lie, and the same were, wholly ungotten and uncleared.

There were two other counts on two other and different leases, in which the same breaches were assigned.

The defendant, after setting out the leases on oyer, the substance of which was as stated in the declaration, pleaded that the mines were never, at any time, before the said demise worked, gotten or cleared in any manner whatever, nor did he, the defendant, at any time since or during the said demise, work, or get or clear the mines.—Verification.

General demurrer and joinder in demurrer.

The plaintiff's points for argument were that the defendant suffered the mines to be unworked and ungotten, whereby the plaintiff was deprived of his rents and royalties over and above the fixed rent, contrary to the covenants contained in the said indentures of lease, and that it was immaterial whether such mines had been worked, gotten or cleared before the demise, and that the defendant was bound to work and clear the mines in a workmanlike manner and according to the custom, although they had not been previously worked.

The defendant's point was, that, upon the right construction of the leases, there was no obligation on the defendant to work the mines mentioned in them.

The case was argued in Easter term (April 25) by PLATT, in support of the demurrer.—The plea is no answer to the action. The object of the plaintiff in letting the mines was that they should be opened and the minerals worked, as well as to have those worked which had been already opened. The parties contemplated the working of new mines as well as the old ones. The plea only amounts to an admission of the cause of action for which the plaintiff has declared.

(PARKE, B.—The question turns on the meaning of the covenant—whether the defendant is to work all the beds of coal, or whether he is to work only such mines as he pleases, working them in a proper manner. The defendant says that on his paying £20 a year, which is the fixed rent, he may work any or none, as he pleases.)

Unless he is entitled to leave the mines wholly unworked,

the plea is no answer. The defendant covenants that he will, at all times during the demise, work the said mines in a proper and workmanlike manner, according to the custom; and the breach is, that he did not work the said mines in a proper and workmanlike manner according to the custom, but on the contrary, permitted them to lie, and the same were, wholly ungotten and uncleared. That breach is not denied by the plea, which merely states that the mines had not been opened. If it is a good plea now, it would be so at any period of the term. It is like the case of a lessee covenanting to cultivate a farm in a husbandlike manner and according to the custom of the country, in which case the lessee is bound to cultivate the farm; and it would be no answer to say he did not cultivate it at all.

(ALDERSON, B.—When a lessee undertakes to cultivate a farm, he undertakes to cultivate the whole farm. That clearly is not the meaning of this covenant. PARKE, B.—The covenant applies to all mines which then had been, or thereafter during the demise should be, discovered or opened. The plea does not say that the mines had not been discovered. The question is, whether it is enough to say that they were not worked, gotten or cleared.)

MARTIN, *contra*.—The true construction of the deed is, that if the parties do work the mines they shall do so in a proper and workmanlike manner; but if they choose not to work them they are not bound to do so, paying the fixed rent. The very terms of the reservation of £20 per annum, whether any coal should be worked or not, shows that it was to be optional with the defendant to work them or not. There is nothing in the covenant to compel him to work the mines. The clause reserving the £20 contemplates that there may be no working of the coal, and there could be no breach without it.

PLATT, in reply.—If this, in terms, had been a grant of a license merely to work the mines, as in *Muskett v. Hill*, 5 Bing. N. C. 694, 7 Scott, 855, it might, perhaps, have been different. But this is an actual demise of the mines themselves. The argument on the other side would go to the extent that nothing at all was demised. With respect to what has been said as to the £20 being to be paid whether the mines were worked or not, there is nothing in that observa-

tion, for if the royalty amounts to more the payment of that sum is to cease altogether.

Cur. adv. vult.

The judgment of the court was now delivered by ALDERSON, B.

This case was heard before my brothers Parke, Rolf and myself, in last term, and the question arose on a demurrer to the second plea. The declaration states that the plaintiff, by deed dated the 13th October, 1839, demised to the defendant and two other persons the mines which at the date of the demise had been, or during the term of twenty-one years thereby created should be, discovered or opened in or under certain lands called Dyffryn House, and the demesne lands thereto adjoining; and in the deed was a covenant by the lessees, jointly and severally, that they would, during the term, work the demised premises in a workmanlike manner, according to the custom. The declaration then avers a breach of that covenant in not working the said demised premises in a workmanlike manner.

There are three counts in the declaration, founded on three separate demises of different mines, but they are all framed in precisely the same language, so that the decision as to one governs the whole. The defendant pleads, by his second plea, that the mines in the first count of the declaration mentioned were not at any time before the demise worked, gotten or cleared in any manner whatever, nor did the defendant and the other lessees, or any of them, work the same or get the mines in any manner whatever; and there are similar pleas as to the other counts. To these pleas the defendant demurred, and the question argued before us was whether, it appearing by the pleas that the mines had not been worked at all, the defendant was liable on his covenant to work the demised premises in a workmanlike manner.

It appears to us, on looking at the pleadings and the deeds in question, which are all set out on oyer, and are very long, that the defendant is clearly entitled to judgment; for the subject-matter of the demise in all the deeds is not the mines under the lands specified in the deed, but only such of the

mines as had been or should be discovered or opened. It is, therefore, plain, that in order to show the defendant to have been guilty of any breach of covenant in not working, or not working in a workmanlike manner, the demised premises, it was absolutely necessary that the mines, the not working of which is the ground of the alleged breach of covenant, should have been discovered or opened. The contrary to this appears on the face of these pleadings, and we are, therefore, of opinion that the defendant is entitled to our judgment.

Judgment for the defendant.

TILEY V. MOYERS ET AL.

(25 Pennsylvania State, 397. Supreme Court, 1855.)

Instroke. A provision in the lease of a coal bank that the lessee shall be treated as having abandoned his lease, if he shall suffer the bank, by any fault of his, to lie idle for a year when it would yield coal, does not apply if he be actually taking coal out of the bank by any means of access leading to the coal.

Appurtenances to coal bank. The lease of a coal bank will carry with it the drifts, platforms and hoppers used in working it, as appurtenant, but the principal thing granted is the right to mine coal, and not the drift or passage leading into the mine.

Error to the Common Pleas of Cambria County.

The action was ejectment to recover a tract of land containing 220 acres. Michael Moyers and Elizabeth Moyers, the plaintiffs below, were the owners of the land for which this action is brought; it was situated on the Allegheny Portage Railroad, was coal land, and had one or more drifts opened upon it, with some of the fixtures necessary for mining and loading coal. On the 29th January, 1852, they leased and demised to William Tiley "their coal bank and the appurtenances thereunto belonging, together with the privilege of timber for use of coal bank, for and during the term and space of ten years, commencing from and after the 1st day of March, 1852, and to continue until fully complete and ended." Tiley,

the lessee, was "to put the coal bank in good working order for the rent of the first year, and to pay the second and third years one quarter of a cent per bushel for each and every bushel of coal taken from the said bank, and for the remaining seven years, one half cent per bushel for each and every bushel taken." The agreement contained (amongst other things) the following clauses: "It is further agreed that the said Tiley is to have the privilege of right of way for a more direct railway, provided it does not interfere with any of the buildings on the land of the said Moyers, together with the privilege of building one or more houses or shops for use of said bank, and to occupy them for the term of the lease, free of rent, and to leave them in good order; the buildings to be substantial. It is mutually agreed that if the said coal bank should stand, by the act of the said Tiley, for one year, when it would give coal, it is to be taken as an abandonment of the lease and to be treated accordingly. It is further agreed that the said Tiley is to leave the bank in good working order; the main gangway to be left open, or in such order so as not to interfere with the taking out of coal after the expiration of this lease; and no other person or persons is to have the privilege of taking any coal from said bank without the consent of said Tiley first had and obtained in writing." The tract of land in which the coal was found, contained 220 acres. It had two openings or coal drifts upon the tract proper; one denominated in the testimony, the Russell drift, and the other the drift above the "lime-kiln." There was a third opening called the O'Neil drift, starting on the adjoining tract of land and connecting with or intersecting the Russell drift on the Moyers tract.

The tract of land upon which this last drift started was in the occupancy of a tenant by the name of Fox. Tiley having failed in an effort to purchase Fox's lease, purchased the land from the owner, Ross. The Russell drift through which Moyers' coal bank had been worked, connected with the old Portage Railroad; and it was alleged that this drift became impracticable by the altered location and grade of the new railroad, and the removal of the old one. Tiley then abandoned this Russell drift, and opened one on his own land, which communicated with the coal on the Moyers' tract, and in this way continued taking coal out of his own and Moyers' land.

The plaintiffs contended that, by the terms of the lease, the "coal-bank" referred to the openings or drifts upon the land at the time of the lease, and the defendant not having used or worked them for a year, from the 1st March, 1853, to the 1st March, 1854, brought this action of ejectment to enforce the clause of forfeiture contained in the lease.

The defendant contended that all that he had done in the changes of working the coal mines had been with the knowledge, acquiescence and advice of the plaintiffs. And also that the true construction of the lease was, that he might take coal from the land at any point, or by any mode most convenient and accessible.

The court below (TAYLOR, P. J.) instructed the jury, that if the plaintiffs acquiesced and agreed to the manner in which the defendant had conducted the mining operations, they could not recover; but if they had not done so, the failure to mine coal through the bank opened on the premises at the time of the lease for an entire year, would be a forfeiture of the lease.

The jury found for the plaintiffs.

J. G. MILES, for plaintiff in error.

WHITE & COFFEY (with whom was HEYER), *contra*.

LOWRIE, J.

The entry or drift to a coal bank is merely a means by which the bank is to be mined and the coal taken out; and when the bank is leased, the right to use the entry, platform, hoppers, and the private roads leading to it, would seem very naturally to go with it as appurtenances. But the principal thing granted in the lease of a coal-bank is the right to take coal out of it, and not the passage to the coal. The provision, therefore, that the lessee shall be treated as having abandoned his lease, if he shall let the bank, by any fault of his, lie idle for a year, when it would yield coal, does not apply if he be actually taking coal out of the bank by any entry. The purpose of the provision is to prevent the lessee from using the property so as to produce no profits to the lessor, and it is not broken in letter or spirit by the adoption of new ways of reaching the coal.

This interpretation of the lease sets aside all the other questions raised in the cause. If Tiley has wrongfully opened a new entry, or made use of an old and abandoned one, or did not put the coal bank or main gangway in proper order, his errors must be corrected by an action for damages, for the parties have not made these matters causes of forfeiture of the lease.

Judgment reversed and new trial awarded.

SHAFTO ET AL. V. JOHNSON ET AL.

(8 Best & Smith, 252. Vice Chancellor's Court, 1863.)

Covenant compelling exhaustion regardless of surface support. Although it is an established rule that where there is a severance of the minerals and the surface, the owner of each must use his own with reference to the other, upon the maxim *sic utere tuo ut alienum non laedas*, still the terms of a lease of a seam of coal may be such as by necessary implication to allow the lessee to get all the minerals without leaving support for the surface.

Expressio unius. Provisions in a coal lease for protection of certain portions of the surface used *arguendo* as authorizing the destruction of parts of the surface not specially mentioned in such connection.

Covenant to win the coal without regard to surface. A covenant in a coal lease "to carry on the colliery in a fair, proper and orderly manner, and according to the best and most approved method of working collieries of a like nature on the rivers Tyne and Wear, and so as to produce with safety the greatest quantity of merchantable coals from and out of each and every the workable seams thereof:" *Held*, not only to authorize but to bind the lessees so to work the mines as to get out the largest quantity of coal consistent with the safety of the mines, without regard to the surface or to buildings erected subsequent to the lease.

Covenants control custom. A general covenant to work a coal mine according to a certain local custom or the custom of other collieries, is to be limited by the special covenants in the same lease.

Letting down the roof of a coal mine, so as to prevent access to barriers of coal left: *Held*, not a ground of complaint where the barriers were not left for the purpose of being worked, but to prevent water coming in from an adjoining mine.

WOOD, V. C.

I have carefully considered this lease, and I can not arrive

¹ Approved in the Exchequer Chamber, in *Taylor v. Shafto*, 8 B. & S. 228.

at the conclusion that any act has been done by the lessees which is unlawful and contrary to the stipulations contained in it.

These cases are not easy to be determined, and, although we are greatly assisted by the light of authority thrown upon them through the decisions in the House of Lords, there is none which represents precisely the case now before me. There are two classes of authorities. First. It is settled that whether there is a grant originally of the minerals, reserving the surface, or whether there is a grant of the surface reserving the minerals, the *prima facie* presumption of law, in whatever way the two properties became separate, is that the owner of the surface has the clear right to the support of it, notwithstanding another person may have an equal right to the minerals and to work them. But then the matter stands, exactly as it was put by Lord Wensleydale, in *Rowbotham v. Wilson*, 8 H. L. C. 348. Which, however, does not materially assist the present case, because there was an express provision which indicated very clearly and definitely the intention of all the parties to the original arrangement that there should be a disturbance of the surface, and they bound themselves to acquiesce in it, as the House of Lords ultimately held, the main question being more upon technical grounds than upon any substantial equity in the case, viz., whether a clause in an award contained words which could operate by way of grant as between the parties who were concerned in the litigation, Lord Wensleydale said (p. 360): "The rights of the grantee to the minerals, by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Prima facie*, it must be presumed that the minerals are to be enjoyed, and, therefore, that a power to get them must also be granted or reserved, as a necessary incident. It is one of the cases put by Sheppard, Touchstone, Chap. 5, p. 89, in illustration of the maxim, '*Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*,' that, by (the) grant of mines is granted the power to dig them. A similar presumption, *prima facie*, arises, that the owner of the mines is not to injure the owner of the soil

above by getting them, if it can be avoided. But it rarely happens that these mutual rights are not precisely ascertained and settled by the deed by which the right to the mines is acquired; and, then, the only question would be as to the construction of that deed, which may vary in each case. The question to be decided in this case is, what sort of right the defendant had upon the facts stated in the case reserved, to get and take away the coals under the plaintiff's land."

Mr. Giffard called my attention to a case in which my judgment went as far as any of the authorities in favor of the person who had reserved the reversion; and in the subsequent decisions in the House of Lords I see every reason to adhere to it. In *Dugdale v. Robertson*, 3 K. & J. 695, there were the common powers, as in the present case, to dig, to open, search for, work, etc., iron, ironstone and coals "except in or upon any demesne lands and pleasure grounds belonging to and occupied with the mansion called Brymbo Hall, and colored red upon the said plan." And upon that the question was whether the mines and minerals under the lands colored red were included in and passed by the lease. Then there was a *proviso* "That all pits or works sunk or raised for the purpose of working the minerals under the grounds colored yellow in the plan should be sunk and raised at the furthest point from the mansion house, at the part colored yellow." The contest there, as it has been here, was that the exception of the mansion house did not override the general right of the plaintiff to have his surface protected, because it might well be that, having that special object in view, he would fence it with a special and particular precaution not at all waiving his general right. And that was the conclusion to which I came. I said (p. 699): "The question in this case resolves itself into the construction to be put upon the indenture; and upon the terms of the indenture it is clear that the mines and minerals under the lands colored red were included in and did pass by the lease; but that the defendants were not authorized by that indenture to work them, or to execute any works upon those lands, or search for any coal or mineral therein."

I added: "As to the rest of the lands comprised in the indenture, the common law right is now clear from the decision of the Court of Queen's Bench in *Smart v. Morton*, 5 E. &

B., 30, although that did not carry the law further than the decision of the Court of Exchequer in *Harris v. Riding*, 5 M. & W. 60. In *Smart v. Morton*, there was a plea that in the deed by which the surface was granted to the parties through whom the plaintiff claimed, there was an express reservation of the mines, with liberty to work those mines and drive drifts, and use any other ways for the better and more commodious working and winning the same; and the grantor covenanted to pay treble damages for such loss or damage as should be sustained by the grantee; that it was in the necessary and needful working of the mines that the defendant had caused the damages complained of, and that he was ready to pay damages according to the covenant. But on demurrer the court held that the plea was bad; for the occupier of the surface had a *prima facie* right to the support of the subjacent strata, and the deed did not authorize any working in derogation of that right. And, so conversely where the minerals are demised and the surface is retained by the lessor, there arises a *prima facie* inference at common law upon every demise of minerals or other subjacent strata, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support, as in the case put in the judgment of the House of Lords (2 Macq. 449) of a demise of the upper part of a house. If I demise to you the lower story of a house and reserve to myself an upper story, the presumption is that I do not part with my right to be supported by the story I demise. It is true, there may be an express stipulation, as there was in *Rowbotham v.*

Wilson, 25 L. J. Q. B. 362, by which the owner of the surface waives his right to support, and agrees to allow the mines to be so worked as to destroy his property; but in the absence of express words showing distinctly that he has waived or qualified his right, the presumption is that what he retains is to be enjoyed by him, *modo et forma*, as was before, and with that natural support which it possessed before he parted with the subjacent strata."

In that passage I put the case as strongly as it well can be put against the view I am entertaining in the present case, and I came to the conclusion that there was a clear indication upon the face of the deed throughout that the plaintiff was

most anxious to preserve Brymbo Hall, and there was a covenant to supply the owner for the time being with coal at Brymbo Hall. The result of my investigation was that the special provisions or clauses, put in to protect the particular house might be thought not to go far enough in themselves, and that the plaintiff had not waived or indicated any intention to waive the support to the house, but on the contrary, those clauses were put in for the purpose of reserving to himself all his general and common law rights to support, and *ex majori cautela* he took care to preserve that special support, and whatever the lessees did, they must not let down the house. It did not appear to me that the *expressio unius* was the *exclusio alterius*, but on the contrary the *expressio unius* was the expression of that which it was the purport and intention of the instrument to carry out all through. The present case seems to me exceedingly different. I think there is a clear and manifest expression of intention upon the whole lease as between the parties on both sides, that all the coal should be worked that could be worked consistently with the provision which protects certain portions of the property; and that the lessor has for his own benefit and for his own purposes inserted a covenant by which the lessee covenants to work the whole of the coal so far as it can be worked with safety, which, for the reasons I shall presently give, will be found to apply entirely to a proper and safe working of the mine. When, therefore, on the one hand, the lessor has stipulated, not by way of privilege to the lessee, but by way of obligation, that he shall work all the coal that can be worked with safety and, on the other hand, certain portions of the property are carefully sought to be protected in such a manner that it is scarcely possible to conceive that there was any intention of going beyond the protection there stated, and, further, a special compensation is provided for damage done to the part not protected, I can come to only one conclusion, viz., that there was an intention that all the coal that could be got, regard being had to the safety of the mine, should be got, and that no damage should be done to the specially protected portions of the surface.

The lease begins by a grant of the general powers of mining, "subject to the restrictions in that behalf hereinafter

contained," preparing the mind for special restrictions to be imposed upon the working, and that where there was to be protection it would be expressed. Then there is a covenant to pay the tenants or occupiers of the lands at the rate of £4 per acre "by way of satisfaction for the loss, damage or spoil of so much of their lands as should be occasioned by pit-room or heap-room, or by the exercise or enjoyment of any of the liberties, privileges or easements thereby granted." That covenant is opened to the question whether it refers to the surface privileges granted or to all the powers of mining. For instance, suppose an acre of ground sunk down bodily into a hole where there could be no possibility of working it, it appears to me the words would be large enough to include a rent of £4 per acre in respect of that acreage which had become absolutely unworkable at the surface in consequence of the privileges granted for the working of the mine. Then comes a covenant by the lessees which is very important; that they will work and carry on the colliery, coal mines and seams of coal "in a fair, proper and orderly manner, and according to the best and most approved method of working collieries of a like nature on the rivers Tyne and Wear, and so as to produce with safety the greatest quantity of merchantable coals from and out of each and every the workable seams thereof, and shall not, nor will at any time during the said term, knowingly do or suffer to be done any willful or negligent act, matter or thing whatsoever which may hazard or endanger the said colliery, coal mines and seams of coal, or any of them, or which may bring any creep or thrust upon the same, or occasion any loss, damage or detriment thereto, or which, may tend to hinder, stop or obstruct any of the water-courses air-courses, passages or drifts which shall be in or belonging to the same." Taking the whole of that covenant together, the only reasonable construction of the former part is that the lessees are bound so to work as to get all the coal they possibly can without danger to the colliery.

The surface is not at all the matter in contemplation. The lessees must not bring creep or thrust upon the mine. The covenant might have application to the low main seam to which I will advert presently, or to stopping up any drift or water-course, but it has no application to any other state of

things. And, therefore, from that covenant standing alone without any other provision it would be implied that the lessees were to get all they could without danger to the mine; still, of course, to a certain extent leaving the question as to the general common law right and the presumed right of support to the surface, provided there was nothing afterward in the lease which touched that question. It is by a combination of all these covenants that we ascertain the true meaning and intent of the parties to the lease. The intent of the lessor so far is, that the lessees should get the greatest quantity of coal without damage to the mine, still reserving his general right to have the surface supported. So far as it goes, it is a strong indication of intention on the part of the lessor to get the fullest benefit he can irrespective of the surface, and only providing against danger to the mine itself. I agree with Mr. Faber that a provision to work according to the best and most approved method of working collieries of a like nature on the rivers Tyne and Wear, only means the best and most approved method of working which will be consistent with the other terms and provisions of the lease and the other legal rights of the parties, and that expression of Tyne and Wear working would not alone justify the cutting away of these pillars, although it may be proved that the common mode of working according to the Tyne and Wear method is to work up to the barrier, and then in coming back to cut away the pillars which were left for the express purpose of working the minerals up to the barrier, the pillars being cut away upon the return, of course with safety to the workman and to the drifts and air-courses and other parts of the mine, but doing that, according to the custom referred to, in a proper, orderly way of working a mine. It is not unimportant in that sense that without looking to the leases now before me, and which the other witnesses have spoken to when they spoke of the method of working according to the Tyne and Wear method, I can only come to this conclusion, not that every lessee is entitled so to do, but, supposing a person has a lease which authorizes his working at all by cutting away the pillars, then the proper method of doing is that which the defendant has adopted, viz., according to the best and most approved method of working on the Tyne and Wear. This is a custom and

practice of cutting away the pillars which must be supposed to be in the minds of these parties, unless we find that they have made some arrangement by which the provision of the lease is to be construed differently.

It is further to be observed that it seems to have occurred to the lessors that the effect of the covenant to work so as to produce with safety to the mine the greatest quantity of merchantable coal, might be to let down houses and injure other property which they would wish to protect; and accordingly, the next covenant which comes in a natural course is, that the lessees "shall not nor will sink any pit or pits within two hundred yards of any dwelling house, building or farmyard erected or to be erected upon any of the lands or grounds herein before mentioned without the consent in writing of" the lessor or his assigns. Even there, the possibility is contemplated of the lessor in giving his consent, being more mindful about his coal than the value of the houses, but still such working is not to be without consent: and then there is a covenant that they "shall and will leave the coal in each and every seam which may be wrought under the mansion house or offices at Whitworth Park, by virtue of this demise, to the extent of the line delineated upon the surface plan upon the back of these presents and therein colored blue, which said coal shall be left for the support of the said mansion house and offices, and shall not be reduced or passed through without such consent as aforesaid on any pretense whatsoever, and shall not nor will without such consent, carry on any surface operations upon, nor by any means whatsoever"—which of course applies to underground operations—"do or occasion any injury or damage to such parts of the lands or grounds herein before mentioned as are now occupied by dwelling houses and their respective offices or by gardens, pleasure grounds or farmyards, or by either of the parks belonging to the Whitworth estate." It appears to me when those two classes of covenants are coupled together the necessary inference is that it is the intent that all the coal that can be got, without hurting the mine, shall be got, provided always that certain specified property, and that alone, shall be protected and its surface right to support saved.

In that respect the present differs widely from the case of

Dugdale v. Robertson, 3 K. & J. 695. The lease protects not merely the mansion house and dwelling houses, but gardens, pleasure grounds and parks, so that the whole surface is contemplated. The parties who had this instrument before them and were preparing to settle their mutual rights and the rights of those who came after them under it, provided, on the one hand, for the benefit both of the lessor and of the lessees that they should work all the coal that they could get, and on the other, for the benefit of the lessor, that not only his mansion house and certain other houses should be protected, but all those then existing upon the estate, the extent of the protection being carefully defined by the words used. When a large portion of the surface is thus selected and protected from disturbance without consent, the inference is irresistible that the working under any other part of the surface is to go on so as to get the greatest quantity of coal.

(His honor then adverted to the acts and dealings of the parties as leading to this construction, and also to the fact that between 1855 and 1856 the viewer, appointed by the plaintiff to inspect the workings of the colliery, had perfect knowledge that the whole of the coal was being got.)

There is another clause about the barriers which immediately follows this, showing that the parties had before their minds all the protection they intended to insert, because they go on to provide for barriers afterward, but taking care as to what shall be done for the due protection of the lessor's interest; and it seems to me, therefore, that as far as regards any portion of the coal worked under land which was simply agricultural, either cultivated or waste, where and on which no buildings were then standing, there has been no infringement of the covenant by the lessees, as they were only bound to support that land upon which the eighteen houses stood, but which had been allowed to be let down by the working five or six years ago, to the knowledge of all parties. The circumstance that five hundred, or any other number of houses have since been built will not alter the rights or duties or obligations of the lessees; the lessor is the person who comes here to complain, and he has knowledge of the lease and its contents, and must be taken to have known all the consequences which result from the lease.

(His honor then disposed of two points relating to the low main seam. First, that the letting down the ceiling, which would impede access to the barriers between this mine and the next, was no ground of complaint, as those barriers were not left for the purpose of being worked, but to prevent the water coming in from the adjoining mine and drowning this mine.

Secondly, that there was no proof of injury to the mine from the low main seam having been let down.)

Bill dismissed with costs.

LEWIS V. FOTHERGILL.

(L. R., 5 Chancery Appeals, 103. Before the Lord Chancellor, 1869.)

“Instroke” is a workmanlike manner of mining—Irremediable damage not presumed. The owner of land agreed to demise the seams of coal under the same to the owners of an adjoining colliery, at a royalty on each ton of coal worked, and at a dead rent of £500 if the royalties did not amount to so much; the dead rent not to be charged for the first three years if the necessary steps were *bona fide* taken, with ordinary dispatch, to win and work the coal. The lease was to contain a covenant by the lessee for working the coal in a proper and workmanlike manner. The lessees proceeded to work the coal by instroke, or headings from their adjoining colliery, which was situated to the rise of the seams to be demised; the lessor alleged that the lessees ought to sink a pit and work the coal from the deep, and filed a bill to restrain them from working from the adjoining colliery, and to compel payment of the dead rent, on the ground that they had not taken the necessary steps to win and work the coal. *Held*, that working the coal by instroke was working in a proper and workmanlike manner, and that if the lessor had intended to compel the lessees to sink a pit, it should have been provided for in the agreement. *Held*, also, that as the lessees were actually working the coal, irremediable damage would not be presumed.

The words “proper and workmanlike manner” admit of the evidence of experts, for no court can be so informed upon the subject of mining as to know what is a “proper and workmanlike manner.” The extreme views of this phrase stated.

¹ **Judicial notice of meaning of terms.** Upon a covenant to work in “a proper and workmanlike manner,” the court will not take either extreme of meaning which may be contended for upon those words, but

¹ *Clark v. Babcock*, 8 M. R. 600; *Clayton v. Gregson*, 9 M. R. 141.

will look to the lease to see how far the landlord has protected himself by the special terms of the contract.

¹ **Relation of instroke to barriers.** When working by instroke is allowed, it is necessarily implied that barriers need not be left between the mines.

² **Instroke.** A lessee of coal mines may work by instroke when the lease does not covenant against it.

Proof of cotemporaneous understanding allowed to aid the construction of terms of art whose meaning is contested.

³ **Coal "won."** It seems that coal is "won" when it is put in a state in which continuous working can be forwarded in the ordinary way, but not when water is reached simultaneously with the coal, so as to necessitate stoppage to provide sufficient means of drainage.

By articles of agreement dated the 27th of April, 1864, and made between W. W. Lewis, of the one part, and T. A. Hankey and B. Bateman, trading under the name of the Plymouth Iron Company, of the other part, it was agreed that W. W. Lewis should let, and the company should take, for ninety-nine years, the veins and seams of coal situate under a farm of 250 acres, called Troed-y-rhiw, in Glamorganshire (with certain exceptions), and all mines, seams or balls of iron ore under the said farm, at the rent or royalty of 8½d. per customary ton of coal worked or gotten; but in case the quantity of coal worked in any year should not amount at the aforesaid rate to the annual rent of £500, then instead thereof the annual rent or sum of £500 should be paid as fixed or dead rent, and a further royalty of 4d. a ton was to be paid on every ton of iron ore; the dead rent of £500 not to be charged for the first three years, provided that the necessary steps were *bona fide* taken, with ordinary dispatch, to win and work the said coal, but the royalties were then to be charged only on such coal and minerals as should be worked. The lease when prepared was to contain power to work any other minerals, etc., over or under the said farm, from any adjoining estate worked through this estate, on payment of 1d. per ton for way-leave. The agreement further specified covenants to be contained in the lease as to keeping accounts, and repairs, and a covenant "for working the said coal and mines in a proper and workmanlike manner." It was also agreed that the lessces might make any

¹ *Jegon v. Virian*, 8 M. R. 629.

² *Whalley v. Ramage*, 8 M. R. 52.

³ *Rokby v. Elliot*, 8 M. R. 651.

roads which might be necessary for conveying the minerals, sink pits, drive headings, and do all other acts and deeds necessary for working the same. Provisions were also made for determining the lease if the minerals were worked out, and for renting surface land if required, and for other matters relating to working the minerals.

The Plymouth Iron Company were working certain coal pits called the South Duffryn Colliery, situated to the north of Troed-y-rhiw, and had commenced to work the coal under Troed-y-rhiw by "instroke" from that colliery, and had run headings from the colliery under Troed-y-rhiw.

The South Duffryn Colliery was "to the rise" of, or above, the seams of coal under Troed-y-rhiw, and W. W. Lewis, the lessor and plaintiff in this case, alleged that this was not the proper way of working the coal under his estate; that the proper way would be to sink pits upon the estate toward the southern side, the expense of which pits was variously estimated at £30,000 to £50,000; that working by instroke was not proper or prudent unless a barrier was left at the boundary of the plaintiff's estate, and the headings were driven so that they could be stopped as a protection against water which might come down. The plaintiff further alleged that coal was not won unless adequate means of draining were provided; that any system of working the coal by dip headings would leave the Troed-y-rhiw estate without any provision for working the other seams, and render them of less value, and that the water would accumulate; that the period of three years, during which the dead rent was suspended, was altogether unreasonable if the coal was merely to be worked by dip headings from the South Duffryn Colliery, and that the defendants could have sunk a pit within the time, and that under the circumstances the dead rent had become payable.

On the 29th of July, 1867, the plaintiff filed his bill against the lessees, the defendants, alleging as above stated, and praying that they might be restrained from working by headings or instroke, or otherwise than in a proper and workmanlike manner, and until an adequate means of draining the coal and minerals under the plaintiff's estate had been provided; that the defendants might be ordered to pay the dead rent for the

three years; and that the articles of agreement might be specifically performed.

The defendants, by their answer, alleged that to work by dip headings was proper and customary, and that they had taken all proper precautions against the flow of water; that they would never have taken the lease, if they had been obliged to sink a pit; that they were working the coal in a proper manner, and that they had been at all times ready to perform the agreement without suit. They also contended that coal was won when it was reached and could be worked.

Evidence was entered into on both sides as to the proper methods of working coal in general, and this coal in particular, the effect of which appears from the judgments of the vice chancellor and the lord chancellor. It appeared from the evidence of Mr. Overton, who was the plaintiff's agent at the time of the preparation of the agreement but was no longer in his employment, that he and the defendants had discussed the mode of working, and that he was aware that they did not intend to sink a pit, and that he considered working by instroke not improper.

The suit came to a hearing upon motion for decree before the vice chancellor, James, who, on the 21st of January, 1869, dismissed so much of the bill as prayed for an injunction; declared that the defendants had taken the necessary steps to win the coal *bona fide* and with ordinary dispatch; directed a reference whether anything was due for dead rent and for other matters, and ordered specific performance of the articles of agreement, and a lease to be executed, and ordered the plaintiff to pay the costs up to the hearing.

The plaintiff appealed.

Mr. JESSEL, Q. C., Mr. KAY, Q. C., and Mr. MARTEN, for the plaintiff.

This is a question of construction on the agreement. We do not say that the pit must be sunk upon the estate, but that there ought to be a pit sunk so as to provide an independent system of drainage, for unless that is done the mine is always in danger. Power to sink a pit is expressly given by the agreement. They are bound to work the coal in the best way

and not to damage the rest of the coal, and they ought to leave a barrier between their mine and the plaintiff's mine; at all events they are bound to work the coal so as not to expose the mine to the chance of being drowned out. What we require is a pit deep enough to drain this coal by gravitation. Even if they have been able to work the coal up to the present time, they may still be in danger of being drowned out. All this is so well understood, that no express provision in the agreement was necessary. The three years provided for show that a pit was contemplated. The defendants may work these mines so as to allow them to be drowned out, and then become insolvent, leaving the property useless.

Sir ROUNDSELL PALMER, Q. C., Mr. AMPHLETT, Q. C., and Mr. FREELING, for the defendants, were not called upon.

LORD HATHERLEY, L. C.

This case seems to me to be one of the simplest description when we look at the agreement itself and at the evidence adduced, which is not conflicting upon the main points, namely, as to what ought to be the construction of the words, "proper and workmanlike manner." Of course when we find words like those, they are open to evidence as to their meaning, because it is a matter, in some degree, of technical knowledge, as to what is a proper and workmanlike manner; and in dealing with any special mode of working, we must have the testimony of those who are experts as to the meaning of the words as applied to the particular subject-matter.

Now the bill is filed upon an agreement entered into in 1864 for the demise by the plaintiff to the defendants of certain valuable mining property. The circumstances of the case, as far as they were known to both parties, were these: that the defendants had other mines immediately to the rise of the property which was agreed to be demised, being separated only by an imaginary line. Of course, therefore, one mine could be worked from the other if it was right and proper so to do. But the plaintiff's contention is, that the proper mode of working would be to work his coal just as the defendants worked the South Duffryn pits, namely, to have a pit or series

of pits sunk to the depth of the particular vein which they were disposed to work, so that whatever water accumulated in the process of working the mine could be carried off into the pit and pumped up, by which means the mine would be preserved from water; and possibly, or I may say probably, that may be most valuable to the lessor as being the best mode of having the mines on his land worked. But it is clear upon the evidence that this is not the only mode of working in a proper and workmanlike manner.

A proper and workmanlike manner may not mean the best possible mode of working for the lessor, but it means in such a manner as shall not be simply an attempt to get out of the earth as much mineral as can be got for the particular purpose of the lessee, regardless of any ordinary or workmanlike proceeding.

That is the extreme contention on the one side, and the extreme contention on the side of the landlord is to say that those words, "proper and workmanlike manner," mean that the lessees are to take means the most expensive possible, and the least likely to produce profit to themselves, for the express purpose of putting the lessor in the best possible position at the time when the lessees give up the mine. Either one or the other of those views is extreme, and we must look to see what the landlord has done with reference to protecting himself by the agreement.

The landlord must be supposed to have known through his agents what it was he was dealing with, and to have known what was the ordinary course of protecting himself if he wished to be protected. Now, as to the two systems in question, the one of working by instroke, and the other of working by means of a pit, they occur continually in mining leases, and provisions are often made expressly upon that subject. It so happens that in this case there is no express provision one way or the other; but it appears from the evidence to be very common where working by instroke is intended, to insert a provision that proper barriers shall be kept to protect the mine from the very grievance which is now spoken of, and there is no such provision in this agreement.

But looking further at the agreement, we find a provision for paying a way-leave on minerals brought to surface from

the adjoining estate, thus contemplating communication between the two mines, so that not only is there no provision against breaking the barrier, but it is expressly contemplated that the barrier may be broken; and if the defendants are allowed to break the barrier, what is to prevent their working the coal?

The question of the instroke always has relation to the question of breaking the barrier. If a man has, by the demise, got the right of entry, you tell him that you do not prohibit his breaking the barrier; on the contrary, you tell him that he may pass the barrier, and carry coal and other minerals worked from one side to the other. So long as he works the mine properly there is nothing, as it appears to me, to prevent his using his right of entering through the barrier and working the coal in that way.

Now, the lessees say that the pit would be a very serious matter to them. There is no witness who says that it would cost less than £30,000, and the proposition that there is an undertaking on the part of the lessees to expend £30,000, about which nothing is said in the agreement, could only be supported by showing that there was no other possible mode of working this mine in a proper and workmanlike manner than through the medium of a pit.

Then the plaintiff further claims £500 a year dead rent because the lessees have not, as he alleges, taken the necessary steps, *bona fide*, to win the coal with ordinary dispatch, and he says, further, that the lessees have begun to work the coal, though they were not bound to do so, but having begun to work it, they have done so in an improper and unworkmanlike manner, and that has occasioned a risk of irremediable injury; and the plaintiff asks that the lessees shall perform their agreement, and if they can not perform their agreement, or from any circumstance it can not be performed, then that there should be an injunction against their working the mine at all.

Now as regards the demand for rent, the ordinary course which this court always takes with reference to an agreement for a lease of this kind is to say that the plaintiff shall have specific performance of the agreement, that the deed shall be executed, and shall be dated as on the day of the agreement, so that the lessor can have his action on the covenant as soon as the lease is completed.

I do not find that the defendants have ever refused to execute the deed, and at the present moment, under the decree of the court, they are ordered to execute a proper counterpart, which, when done, would really settle the whole matter with reference to the question whether or not *bona fide* steps were taken to win and work the coal. There would be a right to an injunction if, in working the coal, the defendants were not doing it in a proper and workmanlike manner, and were doing it in such a manner as was most likely to produce irremediable injury. The only real question now is as to who shall pay the costs of the suit.

Then, as regards the irremediable damage, and the working in an improper and unworkmanlike manner, we have first to consider whether the working by instroke instead of sinking from the surface, is contrary to the provisions of the agreement; and secondly, whether, if it be not contrary to the provisions of the agreement, the defendants, in working by instroke or dip headings, are working in such a mode as is likely to occasion irremediable damage.

If it were only unworkmanlike it might be left on the terms of the covenant, and damages might be recovered at law; but as far as regards any injunction on account of irremediable injury, we must consider that the bill was filed nearly two years ago, and a year and a half before the close of the evidence; and it appears from the evidence that in January last no injury had been done. The coal had been worked, and the mine had not been flooded.

Further, as to the meaning of "a proper and workmanlike manner," we have the evidence of the agent who signed the agreement on behalf of the plaintiff, and he says that he never intended anything of the kind, but actually the reverse. It is said, very justly, that we can not construe the agreement by parol evidence as to what the parties meant by the words; but the words "proper and workmanlike manner," admit of the evidence of experts; for no court can be so informed upon the subject of mining as to know what is a proper and workmanlike manner. In that point of view nothing can be more satisfactory than to find that the two persons who framed the agreement contemplated the very thing being done that has been done, it being, in their judgment, proper and workman-

like. And it is a bold measure on the part of the plaintiff, in that state of circumstances, to come into a court of equity to enforce that which is contrary to what his own agent intended and contemplated.

The only answer to this given by the plaintiff is, that his agent told him a different thing; but that he does not succeed in showing.

The case, however, does not rest there, because there is a vast mass of evidence before me, which I can not possibly disregard, to the effect that the mode of working by instroke is proper and workmanlike. It is said that there is a conflict, and of course there is, and always is, on a matter of opinion, but I think the difference may be very easily explained by taking the two views together, the landlord's view and the tenant's view. It is distinctly stated that working by instroke is the system almost invariably practiced, unless specifically provided against, in this and other districts, when property such as this is worked in connection with large collieries; and many instances in the immediate district are given where larger properties than this are so worked.

There is also a dispute about what is the meaning of the word "winning." I conceive that the coal is won when it is put in a state in which continuous working can go forward in the ordinary way. It is not when you first dig down to a seam of coal and come to water immediately, but when you have got the coal in such a state that you can go on working it, and make provision, if provision is necessary, for sufficient drainage; and in this particular case they say they have got sufficient means of drainage; in fact, I have not heard any suggestion that the mines are being drowned out, and I presume that if it had been so the fact would in some way have been brought before the court.

The decree of the vice chancellor seems to me to be perfectly correct. As to the £500 dead rent, it appears to me that that will be properly and entirely provided for by saying that the lease shall be dated as at the date of the agreement, but no alteration in the decree is required for that purpose. The appeal will therefore be dismissed, with costs.

DANIELS V. HILGARD.

(77 Illinois, 640. Supreme Court, 1875.)

Power to legislate to protect workmen. The legislature has the power to establish reasonable police regulations for the working of mines for the protection of the workmen employed therein; and the act requiring underground map of the colliery to be kept is not unconstitutional.

Intendment in favor of legislative power. The question whether a particular requirement is in excess of the legislative power to establish due police regulations is one to be determined by the legislature itself and such determination ought not to be interfered with unless the legislature manifestly transcend its powers.

Parties—Act requiring map to be kept. Under the act making the county surveyor *ex officio* inspector of mines and requiring him to make the plat of its workings in case the owner neglect so to do, and the county surveyor has the work done by deputy, the county surveyor himself is the proper party to sue for the cost of making such map.

Sufficiency of map. In such case the defendant will not be heard to question the map as insufficient where it has been officially accepted as correct.

Appeal from the Circuit Court of St. Clair County; Hon. WILLIAM H. SNYDER, J., presiding.

This was a suit brought by Gustavus Hilgard against Isaac Daniels, before a justice of the peace of St. Clair county, to recover the cost of making a map or plan of a coal mine operated by the defendant as superintendent. The plaintiff recovered before the justice \$92 and costs, and the defendant appealed the case to the circuit court, where a trial was had before the court without a jury, resulting in a judgment in favor of the plaintiff for \$42 and costs. To reverse this judgment the defendant brought the case to this court by appeal.

C. W. & E. L. THOMAS, for the appellant.

N. NILES and J. M. DILL, for the appellee.

Mr. Justice SHELDON delivered the opinion of the court.

This was an action brought under the second section of the

¹ *Shaffer v. Union M. Co.*, 15 M. R. 59.

"act providing for the health and safety of persons employed in coal mines," Rev. Stat. 1874, p. 704, to recover the cost of causing to be made a map or plan of a certain coal mine or colliery in St. Clair county in this State. The first section of the act requires that the owner or agent of every coal mine or colliery in this State employing ten men, or more, shall make, or cause to be made, an accurate map or plan of the workings of such coal mine or colliery, etc., and deposit a copy thereof with the inspector of mines, and also with the recorder of the county. The second section provides that upon neglect or refusal to furnish the inspector of mines and recorder with such map or plan, the inspector of mines is authorized to cause the map or plan to be made at the expense of the owner or agent, and that the cost thereof may be recovered from the owner or agent by suit in the name of the inspector and for his use.

There having been a failure here, by the owner or agent, to make and furnish this map or plan, Hilgard, the county surveyor of St. Clair county, and *ex officio* inspector of mines within his county, caused the map or plan to be made, and brought this suit against Daniels, the superintendent, for the cost, and recovered \$42. Daniels brings this appeal.

It is first objected that Hilgard, the plaintiff, incurred no expense and did no work and therefore has no cause of action. But he ordered Ropiequet, his deputy, to do the work, who accordingly did it, and we are of opinion Hilgard properly brings the suit, he having performed the service by his agent.

It is next objected that the map is not such an one as the law requires. But it is such an one as Hilgard, in the performance of his official duty under the statute, has caused to be made and has accepted as sufficient, so that it answers the purpose of the map or plan required by the statute, and the defendant has no cause of complaint.

But the principal ground of defense made is, that the first and second sections of the act are unconstitutional. Appellant's counsel do not question the right of the legislature to establish police regulations for the operating of mines, but impliedly concede that, and say that, admitting the constitutionality of all parts of the act which provide for the health and safety of miners, yet they insist that these two sections

in relation to making and furnishing a map, are not police regulations, but simply arbitrary provisions, which have no tendency to protect health or life, and that they compel land owners to make expensive maps for the mere convenience of their neighbors. Experience has demonstrated the necessity of establishing police regulations in regard to the working of coal mines in order to the protection of the health and safety of persons employed therein. Other legislative bodies, as the parliament of Great Britain, and the legislature of Pennsylvania, have been led to enact similar laws upon this same subject; and in their acts for the object of providing for the health and safety of those employed in coal mines, are contained the like provisions for the making of maps.

The Pennsylvania statute, passed March 3, 1870, may be found in Brightly and Purdon's Dig., Vol. 2, p. 1067, and reference to the British statutes passed in the years 1860-'61, may be found in Bainbridge on Mines and Minerals, 645. Our legislature, in an act having for its avowed object the providing for the health and safety of persons employed in coal mines, has thought it proper to incorporate this provision for the making of a map. The law-making powers elsewhere, as it is seen in their laws for the same object, have adopted this same provision. This would seem to indicate as the legislative understanding, that the provision is one in aid of the accomplishment of the purpose of such acts—the protection of persons engaged in such mines; a proper part of the system adopted to that end. The question is properly one of legislative determination.

A court should not lightly interfere in such case. The legislature must have manifestly transcended its province, for it to do so. We are of opinion that it is not for a court to say that the provision here, which is called in question, is anything more than a fair and reasonable police regulation with reference to the subject-matter of the act which the legislature, in its discretion, has seen proper to adopt; and that it should not be set aside as unconstitutional. The judgment will be affirmed.

Judgment affirmed.

1. Specific performance of an agreement to work quarries in a particular manner, refused: *Booth v. Pollard*, 13 M. R. 322.
2. Tenants in common equally entitled to landing rent of the common mine, though worked through a shaft on the separate estate of one of them: *Clegg v. Clegg*, 14 M. R. 289.
3. Whether a mine is exhausted is a question of fact: *Walker v. Tucker*, 8 M. R. 672.
4. Covenant to exhaust mines requires practical, not complete, exhaustion: *N. Y. Co. v. Stephens*, 5 Lea, 468; see *Tod v. Stambaugh*, 37 Ohio St. 520.
5. Statutory liability for accidents arising from want of escapement shafts: *Wesley Co. v. Healer*, 1 M. R. 68.
6. Right of one mine to use the escapement shaft of another: *Loose v. People*, 11 Ill. App. 445; *Com. v. Bonnell*, 15 M. R. 14.
7. Relative rights of adjoining mines on the same seam: *Abinger v. Ashton*, 6 M. R. 1; *Smith v. Kenrick*, Id. 142; *Jones v. Robertson*, 116 Ill. 543. Coal pillars may not be removed to the flooding of a lower mine: *Lord v. Carbon Co.*, 38 N. J. Eq. 452.
8. Working in the "usual and approved" way, explained: *Davis v. Treharne*, 14 M. R. 60.
9. Working by instroke is permissible without special covenant therefor: *Whalley v. Ramage*, 8 M. R. 52.

TAYLOR, Respondent, v. MIDDLETON, Appellant.

(67 California, 656. Supreme Court, 1885.)

¹ **Abandonment a question for the jury.** It is a question for the jury to determine whether a mining location has been abandoned or forfeited prior to an attempted subsequent location.

² **Sufficiency of staking, a jury question.** The marking of a claim must be such that the boundaries may be readily traced, and whether or not the marking conforms to this requirement is a question for the jury.

The construction of pleadings is for the court and not for the jury.

Findings on admitted facts—Ouster. Where, in ejectment, the answer admits ouster, it is erroneous for the court to instruct the jury that ouster was one of the issues to be tried, and that they must find thereon.

Department 1. Appeal from Superior Court, County of Mono.

N. BENNETT and P. REDDY, for appellant.

KITTRELL & OWEN and R. M. CLARKE, for respondent.

Ross, J.

This is an action of ejectment to recover a mining claim. It seems that the ground was originally located by one Neal, and called the "Neal Mine." The plaintiff claims to have subsequently re-located it on the first of January, 1881, under the name of the "Permelia Mine." The instructions of the court to the jury were erroneous in several particulars.

1. The evidence tended to show a location of the ground in question by Neal prior to the attempted location by the plaintiff. Whether or not such location by Neal, if made, was abandoned or forfeited prior to the plaintiff's attempted location on the first of January, 1881, was a question for the jury to determine. If, at the date mentioned, it remained a valid, subsisting location, the ground was not open to location by the plaintiff or any one else. The third and fifth instructions given by the court below were, therefore, erroneous.

¹ *Johnson v. Parks*, 4 M. R. 316.

² *Anderson v. Black*, 11 Pac. 700; 70 Cal. 226; *O'Donnell v. Glenn*, 19 Pac. 302; *Flavin v. Mattingly*, Id. 384.

2. The court further instructed the jury "that a monument of stone two feet high, placed in the center of the location, with a notice of location placed thereon, and a similar monument of stone or a stake at the center of each end of the location, and a similar monument or stake at each corner of the location, are a sufficient marking of the location on the ground, and constitute a valid location of a mining claim." That depends on the condition of the ground to be located. If the conformation is such that monuments and stakes of the description given would so mark the boundaries as that they could be readily traced, they would be sufficient; otherwise not. But that was a question for the jury.

3. The court erred in instructing the jury, as it did in the second instruction, that *if they should find* "that the defendant, in his answer, denies plaintiff's title, possession, and right of possession, and claims title, possession, and right of possession, in himself, then, as to the question of ouster, you are instructed to find for the plaintiff." The construction of the pleadings was a question for the court, and not for the jury. The answer admitted the ouster; and the court, therefore, further erred in the first instruction in telling the jury that the question of the ouster of the plaintiff by the defendant was one of the issues to be tried by them.

Judgment and order reversed and cause remanded for a new trial.

WE CONCUR: MCKINSTREY, J.; MCKEE, J.

1. Lease rescinded by abandonment: *Cowan v. Radford Iron Co.*, 15 M. R. 453.

2. Owners can not abandon and re-locate, to the prejudice of mortgagee of the claim: *Alexander v. Sherman*, 15 M. R. 638.

3. Sufficient proof of abandonment of prospecting contract: *Chadbourne v. Davis*, 15 M. R. 620.

MONT BLANC CONSOLIDATED GRAVEL MINING CO.
v. J. F. DEBOUR, ETC.

(61 California, 364. Supreme Court, 1882.)

Only parties who have filed their adverse claims have a right to sue or intervene in a contest, instituted to try the right of possession to a mining claim upon which application for patent is pending.

Appeal by intervenors from an order denying a petition for intervention, and from a final judgment in the Superior Court of the County of Nevada.

GEORGE S. HURP, for appellants.

C. W. CROSS, for respondent.

THE COURT.

This is an appeal from an order denying the appellant's motion to file a complaint in intervention in the above entitled action. The sole question in the case is whether said complaint in intervention states facts sufficient to entitle the parties in whose behalf it was sought to file it, to intervene in the action.

The plaintiff in the action alleges, among other things, that he is the owner and in possession of the mineral land in controversy; that the defendant claims an estate or interest therein adverse to the plaintiff, and that said defendant had, before the commencement of this action, filed an application in the United States land office for a patent to said land from the government. The appellants admit that the defendant filed such an application, and that he did so with their knowledge and consent, and in pursuance of an agreement between the appellants and the defendant, that when he should obtain the patent so applied for, he would convey to them in fee the undivided one half of two certain lots of said mineral land.

The plaintiff in this action filed its adverse claim to said land, and commenced this action to have the question of the right of possession determined by a court of competent jurisdiction,

as provided by sections 2325 and 2326, U. S. Revised Statutes. It is not claimed that the appellants filed an application for a patent, or any opposition to the issuance of one to the defendant. We are of the opinion that the action is one in which those only who had filed claims to the land in the United States land office could properly be made parties to the action, which was brought for the sole purpose of determining the rights of possession between such adverse claimants. The rights of none other were involved in the action. The only question involved was, whether the defendant was entitled to a patent.

In order to entitle themselves to become parties to this action, it was necessary for the appellants to apply to the United States land office for a patent, or to file an opposition to the application of some one else within the time prescribed by law for so doing. Neither of which did they do.

Order and judgment appealed from affirmed.

HOPKINS ET AL., Respondents, v. NOYES ET AL., Appellants.

(4 Montana, 550. Supreme Court, 1883.)

¹**Possession without location.** Possession of a mining claim, without compliance with the law and the rules of the mining district, gives no valid title or right of possession, and is valueless against a location made and sustained in compliance with the law.

²**Transfer of possession without deed.** A locator takes as by grant from the government, and the thing granted is real estate, and should be conveyed by deed; hence, proof of possession of a mining claim, without any valid location, and of transfer of possession by mere delivery, is immaterial in a suit where the right to possession is contested—and should be excluded.

The marital rights of the husband, in property conveyed to his wife, are only such as regard the rents and profits, and they may be defeated by limiting the grant to her sole and separate use.

Recovery by single co-tenant. A tenant in common has exclusive possession, and may treat the common property as his own against all the world, except his co-tenants.

¹ *Becker v. Pugh*, 15 M. R. 304; *Manning v. Strehlow*, 18 Pac. 627; *Horne v. Ruiz*, 15 M. R. 488.

² *Goller v. Fett*, 11 M. R. 171; *Sears v. Taylor*, 5 M. R. 318.

rules and customs, gives to the locator such an interest in the ground located as that the government has no interest or estate therein that can be granted or conveyed to any other person; and in such a case the government holds the naked title in trust for the locator or his assigns. Having heretofore held (*Robertson v. Smith, supra*) that the locator takes as by grant from the government, it necessarily follows that the thing granted is real estate. Personal property is not conveyed by grant. The term "grant" is only applicable to transfers of real property: 2 Washb. Real Prop. 517. If, then, the possessory interest of the defendant was an interest in real estate, it should have been conveyed by deed. Our statute provides (Sec. 160, p. 435 R. S.) that no estate or interest in lands, other than for leases for a term not exceeding one year, shall be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance, in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same. And section 211 declares that "the term 'real estate,' as used in this article, shall be construed as co-extensive in meaning with lands, tenements, hereditaments, and possessory titles to the public lands in this territory." Thus, by the very terms of the statute, the possessory title of the defendants' predecessors was real estate, and should have been conveyed by deed.

The California decisions referred to do not throw much light on this subject. The case of *Table Mountain Tunnel Co. v. Stranahan*, 20 Cal. 198, holds that "rights resting upon possession *only*, and not amounting to an interest in the land, are not within the Statute of Frauds, and no conveyance other than by a transfer of possession is necessary to pass them." Of course, rights resting upon naked possession only, could not be considered real estate. A mere trespasser might possess such rights. But it is a very different thing where possession is held by virtue of a location and representation in pursuance of the local rules and regulations of a mining district. In such a case possession is supported by a grant from the government, and the possessory title thereby acquired and held is by our statute declared to be real estate. The effect of this decision is that rights resting in possession which do not amount to an interest in the land, are not within the Statute of Frauds. And thus stated, the doctrine is always correct.

In the case of *Hardenbergh v. Bacon*, 33 Cal. 381, the following language is used: "In this State it has frequently been held that the title to a mining claim would pass by a verbal sale, accompanied by an actual transfer of the possession: *Table Mountain Co v. Stranahan*, *supra*; *Gatewood v. McLaughlin*, 23 Cal. 178; *Patterson v. Keystone M. Co.*, Id. 576. It is impossible to reconcile those cases with the Statute of Frauds, except upon the ground taken in the leading case, that "rights resting upon possession only, and not amounting to an interest in the land, are not within the Statute of Frauds, and no conveyance other than a transfer of possession is necessary to pass them." The doctrine of those cases, however, has no bearing when the interest held in the mining ground is considered as real estate.

The declaration in *Mining Co. v. Taylor*, 100 U. S. 42, that a written conveyance is not necessary to the transfer of a mining claim, is based upon the case of *Table Mountain Co. v. Stranahan*, *supra*, which case seems to have been overruled by the later case of *Hardenbergh v. Bacon*, *supra*, in the same State.

3. The original locators of the quartz lode claim described in the complaint, conveyed the same to Olive H. Hopkins, the wife of Robert P. Hopkins, the plaintiff, and it is contended by the defendants that when real estate is conveyed to a wife, in the absence of words in the conveyance limiting the same to her sole and separate use, the property so conveyed, by operation of law, at once becomes the property of the husband, and, therefore, that the husband alone could bring this action. We know of no authority in the books to support the proposition. In the absence of any statutory provision regulating such conveyances, a conveyance of real property to a wife, containing no words limiting the conveyance to her sole and separate use, vests the property in her, and her husband is only entitled to the rents and profits thereof: 1 Washb. Real Prop. 312. These are among his marital rights, and if the wife forfeited the estate, his rights and interests therein would be defeated. If the intention is to cut off the marital rights of the husband, this intention must be so declared in the deed, by conveying the property to the sole and separate use of the wife. The intention must be clear, in order to secure such separate use to the wife, and to exclude the mari-

tal rights of the husband: *Id.* 313, 314, and authorities cited. The marital rights of the husband do not swallow up or destroy the title of the wife, but are limited to the rents and profits, and these rights may be cut off and defeated by apt words in the conveyance declaring such intention.

4. The claim of plaintiff was located by Hale, La Blue and Forrest. Hale conveyed his undivided third interest directly to Olive H. Hopkins, and La Blue and Forrest conveyed to her by attorney. The two last named deeds are defectively executed, but there is no objection to the deed from Hale. So that Mrs. Hopkins either became the owner of the entire property, or the owner of one undivided third interest therein and a tenant in common with La Blue and Forrest, in either of which events she and her husband could maintain this action. One of the incidents of tenancy in common is that each of the co-tenants is entitled to the exclusive possession of the entire property as against the whole world, except his co-tenants. Therefore a co-tenant, in prosecuting or defending actions concerning the common property, may treat the same as his own as against every one except his co-tenant: *Treat v. Reilly*, 35 Cal. 129; *Williams v. Sutton*, 43 Cal. 65.
Judgment affirmed with costs.

STEEL ET AL. V. GOLD LEAD GOLD AND SILVER MINING COMPANY.

(18 Nevada, 80. Supreme Court, 1883.)

¹ **Failure to do annual labor need not be specially pleaded in adverse claim suit.** In ejectment, to recover mining ground, if the defendant relies upon a forfeiture by plaintiff for failure to comply with the local rules, such forfeiture must be specially pleaded; but in an action to determine conflicting rights to mining claims, which may be brought by the plaintiff, whether in or out of possession, each party must prove his claim to the premises in dispute, and proof of forfeiture may be given, though not specially pleaded.

No necessity to adverse later applications. Where a company has applied for a patent to a claim, it need not, in order to preserve its rights, protest against any subsequent applications for the same ground while its own application is pending.

¹ *Contra, Renshaw v. Switzer*, 15 M. R. 345; see *Ducie v. Ford*, 19 Pac. 414.

Appeal from the First Judicial District Court, Storey County.

KIRKPATRICK & STEPHENS and LINDSAY & DICKSON, for appellants.

LEWIS & DEAL, for respondent.

By the Court, HAWLEY, C. J.

This suit was brought to determine the right of possession to certain mining ground for which defendant had applied for a patent. The complaint and answer contain the usual averments. Defendant subsequently filed a supplemental answer, claiming title to the ground in controversy by virtue of a deed from the Jacob Little Consolidated Mining Company. When the cause was tried, plaintiffs introduced evidence, oral and documentary, tending to prove a valid location by them on January 1, 1877, of the ground described in their complaint as the Emma claim. The defendant introduced evidence, oral and documentary, tending to prove a location made by defendant's grantor, Andrew Charles, on August 28, 1878, of the Gold Lead claim. A witness was then called and testified on behalf of defendant that he was and had been acquainted with the premises described in the complaint as the Emma claim ever since the first day of January, 1877. This witness was then asked the following question: "Did the plaintiffs do any work on the Emma claim in the year 1877?" Plaintiffs objected to this question on the ground that defendant, in its answer, failed to plead or rely upon a forfeiture of plaintiffs' interest in the premises in controversy, by reason of their failure to perform the work or make the expenditure required by law upon the Emma claim. This objection was overruled, and the witness testified "that the plaintiffs had done no work on said Emma claim in the year 1877." Other witnesses gave testimony tending to prove that plaintiffs did no work and made no expenditures on the Emma claim in the year 1877, and that plaintiffs did not perform \$100 worth of work in labor on said claim in the year 1878.

The plaintiffs admitted for the purposes of this trial that

the predecessors in interest and grantors of the Jacob Little Consolidated Mining Company made a valid location on the thirty-first of January, 1863, of the Jacob Little Consolidated Mining Company's claim; that said location embraces the portion of the Emma claim described in the answer; that the Jacob Little Consolidated Mining Company, on the second of July, 1877, regularly filed its application for a patent from the United States for said claim; that plaintiffs failed to make or file any protest or adverse claim to said application.

Defendant admitted that the Sierra Nevada Mining Company, within the time allowed by law, duly made and filed its protest and adverse claim to the application of the Jacob Little Company, and within due time instituted a suit in the proper court against the Jacob Little Company to determine the right of possession to the premises embraced in said application; that a judgment was rendered in said action on the twenty-seventh of December, 1878, in favor of the Sierra Nevada Company; that upon the determination of said suit the Sierra Nevada Company caused a certified copy of the judgment roll in said action to be filed with the register of the United States land office; that no further proceedings have been had in said cause nor in said land office under said application; that the Sierra Nevada Company has filed its protest and adverse claim against the application of the defendant herein for a United States patent, and duly commenced an action against defendant, which is pending and undetermined, to determine the right of possession to the premises in controversy herein, and that the Jacob Little Company failed to file its protest and adverse claim to the application of defendant for a patent.

Thereupon defendant offered in evidence a deed executed on the twenty-sixth of September, 1879, from the Jacob Little Company to the defendant, whereby all the right, title, and interest of the Jacob Little Company in and to the Jacob Little claim was conveyed to the defendant. Plaintiffs objected to the admission of this deed in evidence, because it appeared from the admission made by the defendant that the Jacob Little Company, at the time said deed was executed, had no right, title, or interest in the premises in controversy which could be used adversely to the plaintiffs in this action; that

said deed, if admissible at all, is only admissible for the purpose of showing title in the defendant to that portion merely of the Jacob Little claim which is embraced in the Gold Lead and Emma claims, and which is not included within the premises recovered by the Sierra Nevada Company. The court overruled these objections, but limited the deed to so much of the Jacob Little claim described in the deed as was in conflict with the Emma claim.

There was no evidence in the case tending to show that the defendant or the Jacob Little Company ever acquired any title or interest to any portion of the premises in controversy from the Sierra Nevada Company. No evidence was introduced of any local laws, regulations or customs. The premises for which the Sierra Nevada Company recovered judgment include nearly the entire claim described in the deed from the Jacob Little Company to the defendant, and nearly all of the Emma claim which conflicts with the Gold Lead claim and the Jacob Little claim. Judgment was rendered in favor of defendant.

1. Did the court err in admitting evidence to show that appellants did not perform the amount of work required by law during the years 1877 and 1878? It has been decided, in an action of ejectment to recover the possession of mining ground, that if the defendant relies upon a forfeiture by plaintiff for failure to comply with the local rules and regulations of the mining district, the forfeiture must be specially pleaded. The reason given for this rule is that "a defense based merely upon forfeiture does not involve a denial of the plaintiff's possession, or right of possession, at the date of the defendant's entry," (*Morenhaut v. Wilson*, 52 Cal. 268,) which are the only necessary allegations in the action of ejectment. But this reason does not, in our opinion, apply to an action like the present, brought under the "Act" concerning the determination of conflicting rights to mining claims in certain cases," (1 Comp. Laws, 1674,) which is designed to supplement section 2326 of the Revised Statutes of the United States. These actions may be brought by the plaintiff whether he is in or out of possession of the mining ground in controversy, and the "only sensible construction of the law is that

¹ For text of this statute see 1 M. E. 123.

each party must prove his claim to the premises in dispute, and that the better claim must prevail." *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 321. In such actions, the question whether the plaintiff has forfeited any rights under the acts of Congress is necessarily involved, and need not, when relied upon by defendant, be specially pleaded. The court did not, therefore, err in admitting this evidence.

2. Did the court err in admitting the deed from the Jacob Little Company in evidence without limiting it to that portion of the ground which was not in controversy in the action brought by the Sierra Nevada Mining Company against the Jacob Little Company? It seems to us that it is unnecessary to decide this question. The action of the court in admitting it, if erroneous, did not prejudice appellants. The only title which they assert to the ground in controversy is derived from the location of the Emma claim, which was prior in time to the application of the Jacob Little Company for a patent, and whatever rights they may then have had to this ground were waived and lost by their failure to protest against that application; at least, so far as the rights of the contesting parties under that application are concerned: *Rev. St. U. S.*, § 2326.

But appellants contend that the Jacob Little Company had waived its right to the premises in controversy by reason of its failure to protest against the application of the Gold Lead Company for a patent. This position can not be maintained. The Jacob Little Company, having regularly applied for a patent, was not, in our opinion, compelled, in order to preserve its rights, to protest against any subsequent application for the same ground while its own application was still pending in the land department: *Rose v. Richmond M. Co.*, 17 Nev. 25; *Resurvey of Crown Point Lode*, Sickel's Mining Decisions, 116; *Application of Haggin for Patent to Hurricane Lode*, Id. 243.

This contest is not between the Gold Lead Company, as the owner of a subsequent location, and the Jacob Little Company, a prior applicant for a patent. It is between appellants under their title to the Emma mine, which was located prior to the application of the Jacob Little Company, and respondent as owner of the Jacob Little title. We do not, therefore, think that under the facts of this case we are required to decide

whether the Gold Lead Company (respondent) pursued the proper course in order to secure a patent, on the theory that the Jacob Little Company, the Sierra Nevada Company, and the appellants, had each forfeited their respective rights to the ground in controversy.

In a case where a party applies for a patent and thereafter fails, before the patent is issued, to comply with the law in respect to the amount of work required to be done, so that the ground becomes open and subject to re-location, and a new location is made, it may be that the party re-locating the ground should first take steps to have the previous application dismissed in the land department before making an application for a patent, and that the rights of these parties would have to be tried and determined in the land department: *Application for Patent to Wildman Quartz Mine*, Sickel, 275. But, be that as it may, it is enough for us to declare, as we have, that if an application can be made by the subsequent locator, the previous applicant is not required to protest against such an application.

The Jacob Little Company having applied for a patent to the mining ground in controversy in this action, and its application being still pending, it is, it seems to us, entitled to be heard and to have its rights determined in the proper forum where they are questioned, whether it be in the State courts or in the land office. The defendant having procured its title is entitled to the same rights.

We deem it proper to add that it is apparent to us, from the admitted facts in this case, that neither the appellants nor respondent have any right whatever to that portion of the ground in controversy for which the Sierra Nevada Mining Company obtained judgment. The result of this litigation as to that portion of the ground must necessarily be fruitless unless the Sierra Nevada Mining Company has abandoned or forfeited its rights, or will surrender them to the successful party in this action.

The judgment of the district court is affirmed.

LEONARD, J.—I dissent.

ROUGH V. SIMMONS.

(65 California, 227. Supreme Court, 1884.)

¹ **Sufficient code complaint.** A complaint which alleges that plaintiff is the owner and in possession of certain land, and that the defendant claims an estate or interest therein, but has none, states a cause of action.

Appeal from a judgment of the Superior Court of the County of Siskiyou.

A general demurrer was interposed to the complaint and sustained by the court. The plaintiff failed to amend, and judgment for defendant was rendered.

The case is fully stated in the opinion of the court.

W. H. H. HART, for appellant.

H. B. GILLIS and CALVIN EDGEETON, for respondent.

THE COURT.

The complaint alleges that plaintiff is the owner and in possession of the easterly eleven and forty-two one hundredths acres of the Colonel Limberger Placer Mine, and that defendant claims an estate or interest therein adverse to the plaintiff, which claim is without right, and that defendant has no estate, right, title or interest in the said eleven and forty-two one hundredths acres, etc. A general demurrer to the complaint was sustained by the superior court. This was error.

Judgment reversed and cause remanded, with direction to the court below to overrule the defendant's demurrer to the complaint.

¹ This case, as reported in 3 Pacific, 804, was an action supporting an adverse claim.

ROCKWELL V. GRAHAM.

(9 Colorado, 36. Supreme Court, 1885.)

An action to de'ermine an adverse claim to a placer, and to recover a designated portion thereof, is not sustained by proof of a mere easement in the plaintiff over the premises in controversy.

A right of way for a flume to conduct water is such an easement as is protected by the federal statutes, and is not ground for an adverse claim to the land.

Where parties stipulate in open court as to their respective sources of title, evidence in contradiction thereof is inadmissible.

¹ Parol evidence to identify land. Where land is described in several deeds in different terms, parol evidence to identify the premises as being one and the same is admissible.

Appeal from District Court, Clear Creek County.

The defendant having made application for the government title to a certain placer claim, the plaintiff filed an adverse claim, and brought this action for a portion of the premises, to wit, "for one mill-site, 250 feet square, * * * and the *land* for a mill-race from said mill-dam * * * to said mill-site." Trial by jury, and instruction by the court to find for the defendant. Verdict and judgment for defendant.

L. C. ROCKWELL, for appellant.

HUGH BUTLER, for appellee.

ELBERT, J.

The court did not err in instructing the jury to find for the defendant. The evidence does not show title in the plaintiff to either the mill-site or the *land* for the mill-race. The evidence does show title in the plaintiff to a "right of way for a flume to conduct water along the creek to what is known as the 'Railey Mill.'" This is the language of the reservation made in Railey's deed by Dean, his attorney in fact, to Montague, the grantor of the defendant, and (within the boundaries

¹ *Crescent Co. v. Wasatch Co.*, 19 Pac. 198.

of the premises in dispute) this is all that passed by Robert Railey's subsequent deed to Becker, the grantor of the plaintiff.

This is an easement. It is not what is declared on; evidence of it does not support the issue; nor is such a right ground for an adverse claim being fully protected by the provisions of the federal laws: Rev. St. §§ 2339, 2340.

The refusal of the court to allow proof of a pre-emption by Becker is assigned as error. On the trial of the cause "it was stipulated and agreed in open court, by the respective parties, that the plaintiff and defendant claim title from Tarleton Railey and Mary Railey, and that they were the common grantors to plaintiff and defendant. The nature of Becker's pre-emption, the law under which and the purpose for which it was made, does not appear. Presumably the offer was made for the purpose of showing *title* by pre-emption. If so, it was not admissible as being in contravention of the stipulation above stated.

As to the third assignment, it is sufficient to say that the description of the premises contained in a deed from Dougherty to Montague is referred to by Dougherty in his testimony, apparently for the purpose of *identifying* the premises conveyed by Dean, attorney in fact, with the premises conveyed to Montague and by Montague to the defendant, the premises having been described in the two last-named deeds in different terms. Possibly the deed itself was introduced in evidence for the same purpose, but this does not clearly appear. We do not see in this any ground for reversal.

These are all the assignments of error it is necessary to notice. The judgment of the court below is affirmed.

Affirmed.

McEVOY ET AL. V. HYMAN.

(25 Federal Rep. 539. U. S. Circuit Court, District of Colorado, 1885.)

Suit dismissed and reinstated—Effect of receiver's receipt obtained in the interim. Plaintiffs began their suit in support of an adverse claim. This suit was dismissed in vacation by attorneys purporting to represent the plaintiffs, but afterward on motion it was reinstated. While, however, the suit was off the docket, defendants had entered

the land and obtained their receiver's receipt: *Held*, that the action of the land department must be subservient to the final action of the court and that the cause should proceed upon the respective possessory titles as they stood when the suit was first instituted.

On motion for judgment upon the pleadings.

C. S. THOMAS, for plaintiff.

H. M. TELLER, for defendant.

HALLETT, J.

August 10, 1881, defendant made application in the land office at Leadville to enter and pay for a lode mining claim called "Durant," situated in Pitkin county, with a view to obtain title from the general government. In the time and manner specified in section 2325, Rev. St., plaintiffs made claim in the land office to a part of the same ground under another location called by them "Little Giant." This action of ejectment was brought by them November 7, 1881, in support of their adverse claim, as provided in section 2326, Rev. St. No trial of the issues joined in the action has occurred; but on the twenty-eighth day of January, 1885, the suit was dismissed by the clerk in vacation, under an order from attorneys claiming to represent the plaintiffs. Afterward, and at the May term, 1885, plaintiffs, or some of them, appeared by other counsel, and moved to reinstate the case on the docket, on the ground that it was dismissed without authority from plaintiffs, or some of them, or from some persons who had acquired title to the property pending the suit. After hearing, that motion was allowed; and the cause now stands for trial on the jury calendar.

In a supplemental answer, filed at this term, defendant alleges that after the order of dismissal mentioned above, and before the cause was reinstated on the docket, defendant renewed his application in the land office, and was allowed to enter the claim; and a receiver's certificate was issued to him. This, he asserts, was by agreement with certain persons who had acquired title to the Little Giant claim since the suit was brought. Replying to this answer, plaintiff admitted the entry

in the land office, but denied that the persons mentioned in the answer had succeeded to plaintiffs' title in the claim. From the circumstance that other persons not mentioned in the answer, or otherwise appearing of record, have applied to be substituted as plaintiffs in the action in the place of those now appearing, by whom the suit was brought, it may be inferred that the present plaintiffs have conveyed their title, and there is some dispute as to who are entitled to be recognized as grantees.

But that is not material to this inquiry, except as it may tend to show that the controversy exceeds the usual limits touching the validity of mining locations, and involves questions of ownership also. Upon the fact alleged in the supplemental answer, and admitted by plaintiffs, that entry was made in the land office, and a certificate was issued to defendant for the claim, while the suit stood as dismissed under the clerk's orders. Defendant now moves for judgment, and the effect of that entry on this suit is the matter for present consideration.

No doubt is entertained as to the general rule on which defendant relies, that in actions at law a certificate of entry, like a patent, is conclusive of the title. As expounded by the Supreme Court, the rule obtains whenever officers of the land department are invested with judicial authority to decide the facts on which the title to the land in controversy may be obtained, and the patent or certificate of entry affords evidence of such decision. In such cases courts do not undertake to review the decisions of the land department of the government, and they are conclusive of the legal title in all courts, and in all forms of judicial proceedings, where this title must control: *Johnson v. Towsley*, 13 Wall. 72.

In this case, however, and when considered with reference to the time and circumstances attending its issuance, the certificate of entry on which defendant relies can not be of such weight, because the suit is directed to the very matter which is said to be concluded by the certificate of entry, and the officers of the land department had not jurisdiction of the controversy between the parties. The statute is that upon filing an adverse claim in the land office, and suit begun in support thereof, all proceedings in respect to the original application shall be

stayed "until the controversy shall be settled or decided by a court of competent jurisdiction, or the adverse claim waived." Section 2326, Rev. St.

By this suit the controversy between these parties in respect to these conflicting locations was transferred from the land office to this court, with the necessary result to divest the former tribunal of all jurisdiction, until the court proceeding in its own way, and by the recognized methods of the law, shall decide the matter in issue between the parties. And while the controversy is pending here, it can not be affected by any action of the land department. If, upon some alleged settlement of the controversy and dismissal of the suit, the land department has issued a certificate of entry to defendant, it can not have the effect to terminate the suit in this court. The court alone will decide when the controversy is at an end, and until such decision all things done in the land office must be ignored: *Richmond Co. v. Rose*, 114 U. S. 576.

The order of dismissal by the clerk is of no importance, since it was set aside, and the cause was reinstated on the docket. If that order had been allowed to stand it would have established the rights of the parties, no less than the certificate of entry. But it was found to have been improperly entered, and the court had ample power to correct the error by setting it aside. When that was done, all things depending on it, here or in the land office, must, for the purpose of this suit, be regarded as falling with it. The cause now stands on the docket in its first estate as a controversy relating to the title to the claims to be obtained from the government, which is not to be defeated or ended upon any allegation that either party has obtained that title since the commencement of the suit, unless by settlement, or in some manner which may be recognized in this court.

The motion for judgment on the pleadings will be denied.

BECKER V. PUGH ET AL.

(9 Colorado, 589. Supreme Court, 1886.)

Parties to adverse claim suit must prove location. Before plaintiff can recover, or defendant secure a verdict, in a suit supporting an adverse claim, he must show a location under the district rules, or other law in force; under the special statute in such cases occupation alone is not sufficient.

A miner has no rights beyond the ground actually occupied, as against other parties prospecting the ground, except by compliance with the statutory requirements concerning location.

Staking required by district rules. The miners' regulations of Gregory district, adopted in 1860, required the locator to indicate, by stakes or otherwise, upon the surface, the ground or the vein sought to be appropriated.

An action in the nature of ejectment is proper in support of an adverse filed in the land office. But the ordinary rules in ejectment are somewhat modified.

Prayer has no office under code pleading. Under the code, a party is entitled to such relief as his evidence, together with the facts averred in the body of his pleading, justify, regardless of the relief demanded in his prayer.

Appeal from District Court of Gilpin County.

Mr. L. C. ROCKWELL, for appellant.

Messrs. TELLER and ORAHOOD, for appellees.

HELM, J.

This action was brought by appellees to support an adverse filed in the United States land office. The decree or judgment was rendered in 1882. At that time, therefore, the act of Congress of March 3, 1881, was in force. This act reads as follows: "Be it enacted," etc., "that if, in any action brought in pursuance of section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered

¹ *Rosenthal v. Ives*, 15 M. R. 324; *Hopkins v. Noyes*, 15 M. R. 237.

according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office, or be entitled to a patent for the ground in controversy, until he shall have perfected his title."

It will be observed that, until plaintiff below established *title to the ground in controversy*, he could not recover a verdict or judgment. And this remark is equally true of defendant below, who was the applicant for patent. Thus it becomes important to ascertain the meaning of the statutory phrase, "title to the ground in controversy." A more specific statement of the exact question presented would be: Can a recovery, in actions brought to support adverse proceedings, be maintained by proof of occupancy merely of the premises in dispute, or must either party, before he can secure judgment, show a compliance with the statutes, State and federal, and also miners' rules and regulations in force, relating to the *location* of mining claims upon the public domain?

A careful examination of sections 2322, 2324, 2325, R. S. U. S., in connection with other provisions in the act of Congress on the subject of lode claims, leads us to adopt the second of the foregoing views. A fair construction of the provisions referred to is that the applicant for patent must show a compliance with the location statutes, rules and regulations aforesaid. This view is taken by the United States land office. Section 31 of the land office rules, revised and published in 1881, reads as follows: "Attached to the field-notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations and customs of the mining district. State or Territory, in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent." Section 32 of the land office rules commands the applicant, in all cases where the mining records are not destroyed by fire, or otherwise lost, to file a true and correct copy of his certificate, as shown on the records, attested by the seal of the recorder, or, if he have no seal, by his oath. Section 48, relating to the notice filed

in the land office by the adverse claimant, requires a statement under oath concerning his location record similar to that provided in section 32 for the applicant.

These and other land office rules clearly show the construction given by the executive department of the general government to the statutes in question.

This view is supported by considerations both of propriety and justice. The citizen is allowed the privilege by the federal government of appropriating a lode or vein which he discovers upon the public domain and of securing the exclusive possession thereof prior to patent. It is very seldom, in the nature of things, that he can actually possess and occupy the full one thousand five hundred feet of the vein allowed him, to say nothing of the additional surface ground which he is permitted to take. Location statutes, rules and regulations are framed for the purpose of enabling him to hold, prior to patent, constructive possession, as against all other persons, of that part of the vein or veins and surface ground which he can not and does not actually hold *in pedis possessio*. By compliance with the statutes and regulations, and by such compliance alone, can he prevent other miners and prospectors from appropriating those portions of his claim of which he is not in the actual occupancy: *Armstrong v. Lower*, 6 Colo. 582. It is eminently proper that before he shall be permitted to procure from the government a title in fee simple to the ground which he professes to hold and has held by such constructive possession, he should be required to show his good faith by proving compliance with the statutes and regulations through which alone the constructive possession is given.

Authorities other than the federal statutes themselves need scarcely be cited to establish the proposition that, in order to constitute a valid location, compliance with miners' rules and regulations in force at the time, as well as with statutes on the subject, is essential; but counsel are cited to *Sullivan v. Hense*, 2 Colo. 424, and *Cons. Republican Co. v. Lebanon Co.*, 3 Colo. 343.

It was necessary for plaintiffs in this case to establish a compliance with the miners' rules and regulations in force at the time the claims described in the complaint were located.

These claims were in Gregory mining district. In 1860 the citizens of Gregory district, "in convention assembled," adopted "An act defining claims, and regulating the title thereto." This act was offered in evidence, and is before us. It was applicable to the locations of plaintiffs. Among other things, it required the locators of lode claims to post stakes, or otherwise indicate upon the surface, the ground or the vein appropriated. Section 6 thereof reads as follows: "Be it further enacted that any claim or claims now held, either by purchase or discovery, if abandoned for ten consecutive days *after being staked off*, shall be forfeited to any person or persons who may take up the same, and work them, and not abandon them as aforesaid." Section 7: "Be it further enacted that no claim shall be regarded as good and valid unless *staked off* with the owner's name, giving the direction, length, width, and date when the same was made; and, when held by a company, the name of each member shall conspicuously appear."

The phrase "staked off," occurring in both of these regulations, evidently refers to marking the boundaries of claims by stakes, or at least to the posting of stakes along the vein or its croppings, so as to indicate to other prospectors the ground intended to be appropriated. It is hardly possible that this phrase, as thus used, could mean simply the erection of a single stake, containing a notice somewhat similar to that required upon what is now denominated the "discovery stake." But we need not determine exactly what sort of stakes were meant, or the number thereof; for there is in the record before us, from first to last, no proof of any kind whatever concerning the erection of a stake or stakes anywhere upon the claims; nor is there any evidence to show that the boundaries or the vein were in any other way designated. Therefore we must hold that no sufficient location by plaintiffs was proven, and that, under the views above announced, they were not entitled to recover. If, in the opinion of the court, defendants also failed to establish a valid location, the finding in this case should have been that "title to the ground in controversy" was not shown by either party, and judgment should have been entered accordingly.

In view of future proceedings it is necessary for us to consider another question discussed by counsel. To support an

adverse filed under section 2326, R. S. U. S., an action in the nature of ejectment is undoubtedly proper. Some of the rules pertaining to ejectment are, however, modified in the trial of such causes. For instance, no proof by plaintiff of an actual ouster is necessary; and, upon proper showing otherwise, the action may be maintained, even though plaintiff be himself in the actual possession and occupancy of the disputed premises, or even if the premises at the time the suit is commenced be not in the actual possession of any person. *Morr. Min. Rights* 184, and cases.

The complaint in the case at bar is defective, and was obnoxious to demurrer. But defendant waived this objection, and filed his answer. Moreover, when plaintiffs asked leave to amend the complaint so as to cure these defects, defendant objected, and upon his objection the application was denied. While this complaint seems to have been framed upon a mistaken theory in one respect, it yet shows clearly the cause of action which the pleader intended to state. No one can read it and not arrive at the conclusion that the suit was brought under an adverse filed to contest defendant's application for patent to the premises in controversy, and that the purpose of the pleader was to put in issue and try the questions which by section 2326, R. S. U. S., are submitted to courts for adjudication. The amendment sought by plaintiffs, had it been permitted, would not have changed the cause of action. It would simply have produced a more specific statement of the nature of the claim or interest asserted by them. Under the practice in this State, a party is entitled to such relief as his evidence, together with the facts averred in the body of his pleadings, justify. The prayer of a complaint, or the relief demanded therein, is not conclusive as to the nature or extent of the recovery: *Kayser v. Maugham*, 8 Colo. 232; *Bliss*, Code Pl. § 161.

The fact that plaintiffs asked for a decree, and not for a judgment, therefore, is of no significance. The body of the complaint showed that the actual relief desired was legal in its nature.

Should the cause be re-tried, plaintiffs may have leave to amend their complaint, if they shall be so advised.

The judgment is reversed.

Reversed.

WOLVERTON V. NICHOLS.

(119 U. S. 485. Supreme Court, 1886.)

The possession of the premises, by a tenant of plaintiff in suit supporting adverse claim, does not defeat plaintiff's right to recover. He can not be nonsuited on the ground of no possession proved.

¹ A party who has covenanted to convey, but has not yet executed his deed, may support an adverse claim, and is bound to do so to enable him to keep his covenant in good faith.

Facts of the case—Conflicting claims. A, having made application for patent, was adversely by B. On trial of suit supporting adverse it was disclosed that B had covenanted with C to give him a "good and sufficient deed," and C was in possession under the executory contract containing this covenant. B was nonsuited on the ground that he was not in possession. *Held*, that such ruling was error. That there being privity between the adverse claimant and the person in possession, the technical want of possession in plaintiff did not defeat his right to have the title adjudicated by a verdict of the jury upon the respective claims of the applying and adverse claims.

² **Ouster.** An applicant for patent can not rely on trial on want of proof of an ouster.

Error to the Supreme Court of the Territory of Montana.

EDWARD O. WOLOOTT, for plaintiffs in error, submitted on his brief.

WILLIAM HERBERT SMITH and WALTER H. SMITH (F. C. FORD was with them on the brief), for defendants in error.

Mr. Justice MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of the Territory of Montana. The suit was brought in the District Court of that Territory to settle the controverted right to a patent from the United States for a placer mine, under §§ 2325 and 2326 of the Revised Statutes of the United States. It is therein enacted that a person who has located and set up a claim for mineral lands, and who desires to get a patent for it, shall file in the proper land office an application for such patent, showing a compliance with the laws on that subject, and

¹ *Feemster v. May*, 13 S. & M. 275; 53 Am. Dec. 83.

² *Burke v. McDonald*, 13 Pac. 351.

a plat and field notes of the claim, and shall post a copy of such plat, with a notice of the application for the patent, in a conspicuous place on the land, for sixty days. If no adverse claim for the same is filed with the register within sixty days from this publication, and if the papers are otherwise in proper form, the patent shall issue; but where an adverse claim is filed during the period of publication, it shall be upon oath of the person making the same, showing the nature, boundaries and extent of his claim, and "it shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment."

In the case before us the defendants, Nichols and Fuller, having made their application for a patent for a placer mine, the plaintiffs in error, the widow and heirs of Nelson Wolverton, filed the requisite claim in the register's office, adverse to that of Nichols and Fuller, in due time, and afterward, in compliance with the act of Congress, instituted the present suit in the District Court of Montana to determine the right of possession. Upon the trial of this case before a jury, the plaintiff made what appears to be satisfactory proof that Nelson Wolverton had in his lifetime taken the necessary steps to establish his claim to the mine, or to that part of it now in contest, and had been dead about two years when these proceedings were commenced. In the course of the production of the plaintiffs' evidence it was developed, by cross-examination, that Mrs. Wolverton, acting for herself and as guardian of the two children of her deceased husband, had executed and delivered the following instrument:

"Know all men by these presents that I, Margaret J. Wolverton, widow of Nelson Wolverton, deceased, for myself, and as guardian for Eva Jane Wolverton and William Arthur Wolverton, infants under the age of twenty-one years, for and in consideration of the sum of one dollar to me in hand paid by the Colorado & Montana Smelting Company, and the farther consideration of said company prosecuting to a successful conclusion the cause of J. R. Clark, administrator of the estate of Nelson Wolverton, deceased, et al. v. Silas F.

King, now pending in the District Court in and for Silver Bow County, have covenanted and agreed, and by these presents do covenant and agree, to convey, by a good and sufficient deed of conveyance, duly acknowledged, all that certain land bounded and described as follows: Beginning at a point on the easterly extremity of certain placer mining claims belonging to the estate of the said Nelson Wolverton, and located in Independence Mining District, Silver Bow County, Territory of Montana, in Township No. 3 North, Range No. 8, West of the principal meridian, which said point is due east from the most southerly point of a certain fence running westerly therefrom along the general course of said Silver Bow Creek; thence in a due west line from said point, touching the most southerly point of said fence, a distance of about thirteen hundred feet, to a point on the westerly extremity of placer mining claim number two hundred and thirty; thence from said point due south along the westerly boundary of said last named placer claim to the most southerly boundary thereof; thence along the most southerly boundary of said placer mining claim, and placer mining claims numbers 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241 and 242, in an easterly direction to the southeast corner of said placer mining claim number two hundred and forty-two; thence in a northerly direction from said corner to the point or place of beginning; it being intended to convey all that part of said placer mining claims numbered from two hundred and thirty to two hundred and forty-two, both inclusive, which lies south of the most southerly point of the fence first above mentioned: To have and to hold the same unto the said The Colorado & Montana Smelting Company, their successors and assigns, for their own benefit and behoof forever.

"In witness whereof I have hereunto placed my hand and seal this 12th day of May, eighteen hundred and eighty-one.

"MARGARET J. WOLVERTON. (Seal.)

"MARGARET J. WOLVERTON, (Seal.)

"As guardian for Eva Jane Wolverton and William Arthur Wolverton. In presence of Caleb E. Irvine."

It was proved that the Colorado & Montana Smelting Company, who had held this property for two years under a lease, or as tenants of the Wolvertons, were now in the actual con-

trol and possession of the property mentioned in this instrument. An attempt was also made to show that they had performed the condition mentioned in it, and were entitled to the conveyance which that instrument provided should be made when this was done. Thereupon, at the suggestion of defendant's counsel, the court ordered a non-suit. This judgment was affirmed in the Supreme Court of the Territory, and is the subject of consideration here.

The ground upon which this nonsuit was ordered is that the plaintiffs were not in the actual possession of the property at the time of the trial and that under the statute of Montana, § 354 of the Code of Civil Procedure, this was an absolute necessity to the successful prosecution of this action. That section is in the following words:

"An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest."

But whatever may be the effect of that statute in an ordinary action which has no direct relation to the proceedings under the act of Congress which we have referred to, we are of opinion that, as applicable to such a case, the construction given by the court is entirely too restricted. The proceedings in this case commenced by the assertion of the defendants' claim to have a patent issue to them for the land in controversy. The next step was the filing of an adverse claim by the plaintiffs in the land office; and the present suit is but a continuation of those proceedings, prescribed by the laws of the United States, to have a determination of the question as to which of the contesting parties is entitled to the patent. The act of Congress requires that the certified copy of the judgment of the court shall be filed in the land office and shall be there conclusive. And we must keep this main purpose of the action in view in any decision made with regard to the rights of the parties.

It appears from the evidence that at the time these proceedings took place in the land office the smelting company was in possession as the tenant of the Wolvertons, and that the contract by which Mrs. Wolverton undertook, upon certain conditions, to convey all the right of the Wolverton heirs to

the smelting company, was made after the commencement of those proceedings. It might very well be maintained that having thus commenced such proceedings, at a time when the possession was in the Wolvertons, they could be conducted to a termination in their name. But however that may be, it is quite clear, upon the testimony before us, that Mrs. Wolverton had not completely parted with her interest and that of her children in the land in controversy at the time of the trial. The language of the instrument by which this is supposed to have been done, is that she will thereafter convey the lands described. This conveyance has never been made. The whole thing rests in promise or covenant to do it in the future. This covenant also is that it shall be done by a good and sufficient deed of conveyance. These words have always been held to mean a conveyance of a good title, and though in point of fact the legal title was in the United States, as it is yet, still the parties understood very well that they were dealing with regard to a class of claims which the United States, by statute and otherwise, had always recognized, and the meaning of the covenant was that she should convey such an interest in the property as would enable the other parties, if they chose, to obtain the patent from the government. She, therefore, was interested to defeat the claim of the defendants, who were seeking to get that patent; it was her duty and her interest to contest their claim and have the right to the patent decided in favor of the claims which she set up as being derived from her late husband. This was necessary to enable her to make that "good and sufficient conveyance" which this covenant required, and which had never been made, and if she had stood by and permitted the defendants to obtain the patent from the United States she would have been unable to comply with her contract to convey a good and sufficient title to the smelting company. In fact, so far as regards the right of possession, which alone is in controversy in this suit, the interest, the claim, and the rights of the plaintiffs, the Wolvertons, and of the smelting company are in privity with each other and are identical. And inasmuch as this is a contest provided for by the statutes of the United States in order that the officers of the land department may be informed which of the two contestants before it is entitled to the patent,

we see no reason why the plaintiffs here should not have been permitted to have the verdict of a jury on that question in this suit. And, since such possession as the smelting company had was a part of and in subordination to the title of the Wolvertons, the judgment in this case between the parties to this suit would have settled the question which the act of Congress required to be settled. We are of opinion, therefore, that so far as regards this, the main ground on which the court below directed a nonsuit, that court erred.

Something is said in the brief about the fact that the plaintiffs have failed to show that the possession of these parties conflicted. On that point it is sufficient to say that the plaintiffs, in their petition, asserted a claim to the southeast quarter of the southeast quarter of section 23, in township 3 north, range 8 west of the principal meridian of Montana, and that the defendants, in their answer, admit that they have applied for a patent for the same land exactly. If they did not desire to have the question of the right of possession to any part of these forty acres submitted to a jury on the ground that they did not claim it, they should have made a disclaimer. Apart from this, so far as relates to the evidence on the subject, we are of opinion that there was sufficient to go to the jury to show that the plaintiffs' claim did include a part of that claimed by the defendants in this action.

For these reasons the judgment of the Supreme Court is reversed, and the case remanded for further proceedings.

HAMILTON V. SOUTHERN NEVADA GOLD & SILVER MINING COMPANY.

(33 Federal Rep. 562. U. S. Circuit Court, District of Nevada, 1887.)

Execution sale of mine pending application for patent. The locator of mining ground under U. S. Rev. St., prior to the actual payment of the purchase money, and the reception by him of the receipt therefor, issued by the register and receiver of the proper land office, possesses a mere privilege to purchase the property, and a constable's sale of the mine before payment, only passes that privilege. If the sale is valid, the purchaser can only step into the shoes of the execution debtor, and thereby obtain a right to go on, perform the necessary acts, pay the

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purchase money, contest the rights of other adverse claimants, and make the entry and receive the certificate of purchase himself. If the judgment debtor subsequently performs these acts himself, and receives the title from the government, a new and further title becomes vested in the judgment debtor, which does not pass by virtue of the officer's deed.

¹ **Title between entry and patent.** A party having paid the purchase money, and received the certificate of purchase, is the owner of the land. The United States has ceased to have any pecuniary interest in it. It holds the naked, dry, legal title for the holder of the certificate.

Such a certificate of purchase can not be collaterally assailed.

Adverse possession—Statute of Limitations. Possession of a mining claim, in order to vest a title under the Statute of Limitations, must be open, notorious, exclusive and continuous, and not a loose, uncertain, scrambling and mixed possession.

² **Publication of notice—Effect of failure to adverse.** Under an application for a patent for mining ground, under sections 2325, 2326, Rev. St., unless adverse claims are filed with the register and receiver of the proper land office within sixty days after the first publication of the notice, such adverse claims are waived, and the applicant is entitled to a patent upon the payment to the proper officer of the statutory fees and costs, and it shall thereafter be assumed that no adverse claim exists; and thereafter no objection from third parties to the issue of the patent shall be heard, except that it be shown that the applicant has failed to comply with the terms of the statute.

The interest or title obtained by a purchaser at a constable's sale prior to the expiration of the publication of the notice is an adverse claim which, unless filed as the statute provides, is waived.

³ **Application for patent, a proceeding in rem.** The statute makes such a proceeding regularly prosecuted, when the period of notice is completed without the presentation of an adverse claim, absolutely conclusive against adverse claims. The proceeding is in the nature of a proceeding *in rem*, and is binding upon all the world, so far as any unrepresented adverse claims are concerned.

Judicial sale—Title of purchaser. The purchaser at a judicial sale acquires only the present interest of the judgment debtor. No after-acquired title is affected by such a sale. The sheriff's deed can, at most, only have the operation of a quit claim deed in the strictest sense.

The general objection "irrelevant and incompetent," made before the master in an equity case, is not sufficiently specific to be entitled to consideration upon the hearing.

Amendment of pleadings after hearing. Where an objection to the relevancy or competency of the testimony is made specific for the first time in the closing argument for the complainant in an equity case, the court will permit the defendant to so amend his pleadings as to obviate the objection, where the testimony is before the court showing a proper case therefor.

(*Syllabi by the Court*)

¹ *McEroy v. Hyman*, 15 M. R. 300; *Aurora Hill Co. v. 85 M. Co.*, *Id.* 581.

² *Raunhein v. Dahl*, 9 Pac. 892.

³ *420 M. Co. v. Bullion Co.*, 11 M. R. 609.

In equity.

This is a suit brought by plaintiff, Hamilton, against the Southern Nevada Gold & Silver Mining Company, to determine an adverse claim of title to a mine.

R. S. MESSICK and M. N. STONE, for complainant.

J. McM. SHAFTER, W. C. BELOHER and SCRIVNER & BOONE, for defendant.

SAWYER, J.

This is a suit in equity, brought under the statute of Nevada, by a party claiming to be in possession against a party alleged to be out of possession, to determine an adverse claim of title to a mine. The locator's title was conveyed to defendant June 30, 1880, and the complainant alleges that he has obtained the title so conveyed to defendant, through sales on certain judgments made subsequently to the said conveyance of June 30, 1880. A constable sold the premises on a judgment rendered by a justice of the peace against defendant, said sale having been made July 21, 1882. Such title, as passed by that sale, has been conveyed to complainant. An appeal from said judgment was taken to the district court, and on such appeal a judgment was rendered in the district court for the amount recovered below, and subsequent costs. Under this judgment, for the same indebtedness, the property was again sold on October 11, 1883, and such title as passed by this sale has also become vested in complainant. It is insisted that the judgment of the justice of the peace is void, on the ground that, it not being a court of record, its jurisdiction must affirmatively appear, and that the record does not show jurisdiction over the person; also, for numerous other reasons. It is also claimed, and if it be so I do not see how the conclusion can be avoided, that the justice's court, not having obtained jurisdiction, the appeal from this void judgment could not give the district court jurisdiction, and its judgment is also void. On the other hand, if the justice's judgment and the sale under it be valid, the sale under the district court judgment is claimed to be void because the sale was for a much larger amount than was due, the judgment for the entire indebtedness having

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been fully satisfied by the sale in the court below. It is also claimed that the judgments and sales upon both judgments are void for many other reasons. The defendant also claims title under another judgment, and sale thereunder, made April 29, 1882, to one Purcell—an older sale than either of those under which complainant claims. If this sale is valid, it cut off defendant's original title before the sales under which complainant holds, and they took nothing by those sales, and the title upon which he relies fails. The title derived under this sale, which was outstanding at the commencement of this suit, has been conveyed to defendant since the suit was commenced. But since it intercepted the very title under which complainant holds, and is the same title upon which he relies, it is just as effectual outstanding as a defense as if it were in the defendant at the institution of the suit, even if, as complainant claims, his objection to the evidence, because not set up by supplemental answer, was sufficiently specific to reject it, which is, at least, doubtful. But the validity of this judgment and sale is also assailed on various grounds. It may well be considered doubtful whether any of these judgments and sales are valid.

The Statute of Limitations is also relied on by complainant. But that title is disputed by defendant, on the ground that there was no notorious, exclusive, and continued adverse possession by complainant; that the acts of possession were so obscure that defendant was not even aware that complainants were in possession at all, or claimed title. The only evidence of actual possession for the prescribed time, was going upon the land once, and looking at its boundaries, and afterward doing the annual hundred dollars worth of work in tunnels where those doing it were unseen, during that time, for the purpose of not forfeiting complainant's rights, and not rendering the claim liable to re-location. While defendant also claims and introduces testimony showing, or at least tending to show, that it also did the annual work required by the statute to preserve its rights during the same period for the same purpose, and so was itself in possession; that its possession was better than, or at least as good, as that of complainant. Evidently such a loose, uncertain, scrambling, and mixed possession is not sufficient to vest a title under the Statute of Limitations.

But the defendant relies upon another defense, ~~and~~ the view we take of it renders it unnecessary for ~~us~~ to decide the numerous other points made, already referred to. On August 5, 1882, defendant filed an application in the proper land office to purchase the premises in question, in pursuance of sections 2325, 2326, Rev. St. The sixty days for publication expired (October 7, 1882, and on May 8, 1886, defendant paid for the land, and a certificate of purchase was issued to it. Neither the complainant, nor any of his grantors, before the expiration of the time, or at any time, filed any adverse claim with the register and receiver of the land office. And the statute provides that—

“If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that, *no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard*, except it be shown that the applicant has failed to comply with the terms of this chapter.”

Thus the statute itself makes a proceeding, regularly prosecuted, when the period of notice is completed without the presentation of an adverse claim, absolutely conclusive against all adverse claimants. The proceeding is in the nature of a *proceeding in rem*, and is binding upon all the world, so far as any unrepresented adverse claim is concerned. The title, such as it was, good or bad, derived under the constable's sale of July 21, 1882, was an existing adverse claim during the proceedings of defendant for purchase under sections 2325, 2326, Rev. St., and was lost by failure to present it. This sale, therefore, valid or void, can afford no grounds for the relief sought.

But complainant insists that his title under the second sale on the judgment on appeal did not exist at the time of the application to purchase, and during the running of the notice, and as complainant and his grantors had no adverse claim at that time they can not be affected by failure to present one; that he is a successor in interest to defendant, and not an adverse claimant, and, as such, is entitled to the benefit of defendant's application and purchase. Conceding that judgment to be valid, for the purposes of this suit, though I am

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by no means satisfied that it is, the most that could pass by the sheriff's sale was the then present interest or estate of the defendant. It could not carry any subsequently acquired interest. The then present interest of the defendant was only a mere privilege to purchase, which he might abandon if he chose. A sheriff's deed can, at most, only have the operation of a quit claim deed in its strictest sense. It can not pass an interest which the owner did not have before the sale, but which he subsequently acquires. If the purchase at sheriff's sale was valid, and the purchaser then stepped into the shoes of the execution debtor, it only gave him a right to go on himself, perform the necessary acts to be performed, pay the purchase money himself, contest the rights of other adverse claimants, such as the Northern Belle, make the entry, and, upon payment, receive the certificate of purchase. Since that sheriff's sale the complainant has done nothing, but the defendant has itself gone on and procured the title from the United States upon further and new considerations, in which complainant has no interest, and a new and further title to the premises has become vested in defendant. It is a right at law. If complainant has any equities which he might enforce by doing to the defendant such equities as the nature of the case requires, (but I do not say that he has,) he has not framed his bill upon any such theory. His bill goes upon the theory that he is seized of a legal title already to this mining land, whereas the title derived from the government is vested in the defendant, and it was acquired since the sheriff's sale to complainant's grantors. The defendant having paid the money, defended the suits on adverse claims, and received the certificate of sale, is the owner of the land. The United States has ceased to have any pecuniary interest in it. They hold the naked, dry, legal title for the holder of the certificate: *People v. Shearer*, 30 Cal. 648; *Gwynne v. Niswanger*, 15 Ohio, 368; *Astrom v. Hammond*, 3 McLean, 108; *Carroll v. Perry*, 4 McLean, 26; *Ross v. Supervisors*, 12 Wis. 38; *Goodlet v. Smithson*, 5 Port. (Ala.) 246; *Carroll v. Safford*, 3 How. 441; *Witherspoon v. Duncan*, 4 Wall. 218, 219; *Hughes v. U. S.*, Id. 232; *Wirth v. Branson*, 98 U. S. 118; *Union M. Co. v. Dangberg*, 2 Sawy. 455. This certificate can not be collaterally assailed, and, as before said, if there are any equities

in favor of complainant, they must be enforced by a bill framed for and adapted to the purpose.

It is insisted that the certificate was irregularly obtained, and that it is void on that ground, for the reason that there was pending litigation between defendant and other parties to settle the title to the mining ground between them at the time the certificate was issued. Within the time allowed by statute, after the publication of notice, the Northern Belle Mining Company filed an adverse claim, and in due time commenced several suits against the defendant to determine the rights of the respective claimants. These suits were the occasion of the delay in the issue of the certificate to defendant. They were continued along, for some reason, without any active prosecution, for several years. Finally, the defendant, in the absence of any representative of the Northern Belle Mining Company, procured a dismissal of those suits for want of prosecution. After their dismissal, the defendant presented transcripts of the records to the proper land office, showing that fact, and thereupon the purchase money was received from, and the certificate of purchase issued to, the defendant. Afterward, upon a showing on the part of the Northern Belle Company, the dismissals in the several suits were set aside, and the causes restored to the calendar for further proceedings, and they still remain undetermined. I do not perceive how that condition of things can avail the complainant in this suit. He does not claim under the Northern Belle Company, or in any way connect himself with the rights involved in those suits. He is not in privity with the Northern Belle Company. The title has still passed to the defendant from the United States in a course of proceedings apparently regular, and it can only be divested in some direct proceedings appropriate to the case. If the Northern Belle should succeed in establishing the superior right in the pending suits, it may be that it will be able to control the title for its own benefit, upon a proper bill in equity against defendant, filed for that purpose. But whether it can or not is no concern of the complainant in this suit. Till divested by some proper proceeding, the right to a patent will remain where it now is.

Conceding the adverse possession to be sufficient to set and keep the Statute of Limitations in motion, it has not in any

event run long enough to be of any avail to cut off the new right vested in defendant under the certificate of entry so recently issued. Indeed, it has not yet begun to run. This suit was commenced on March 29, 1886, and the certificate of entry was issued on May 8, 1886, since the commencement of the suit.

It is objected that this certificate is not available in this suit for the reason that it was not pleaded in the answer. As it was obtained since the commencement of this suit, it is insisted that this title should have been set up in a supplemental answer, and, as this was not done, it can not be considered at all. It would, undoubtedly, have been the proper practice to set it up in a supplemental answer. But I am by no means certain that it was absolutely necessary to so set it up in order to render it available. The right to the certificate had its inception at the making of the application, but its issue was delayed by the adverse claim and suits by the Northern Belle. When issued, however, the right related back to the time of its inception by making the application, so far as supporting the right of defendant is concerned. But this specific objection was not made at all before the master, nor even in the opening argument of complainant. It was only first presented in complainant's closing argument, in reply to the argument of defendant, wherein this title was earnestly pressed and relied on. The party offering evidence is entitled to have the particular portion of evidence objected to pointed out, *and the specific ground of objection stated, in order that he may obviate the objection: Satterlee v. Bliss*, 36 Cal. 489, 511; *Cochran v. O'Keefe*, 34 Cal. 554, 558. Objection that evidence offered is "irrelevant and incompetent" is not sufficiently specific, even in a criminal case: *People v. Frank*, 28 Cal. 519. "Irrelevancy" is too general and insufficient. "The party must state the exact point of his objection." *Owen v. Frink*, 24 Cal. 177. The general objection "irrelevant and incompetent," made before the master, it appears to me, is not sufficiently specific to be entitled to consideration now. The real point of the objection, that the title perfected since the commencement of the suit should have been set up in a supplemental answer, should have been specified. The defendant would then have been able to obvi-

ate it by obtaining leave to set it up. But this objection was reserved till the closing argument of the complainant at the final hearing of the case. In my judgment, the failure to call attention to it before the master was a waiver of the objection. When particular grounds of objection are specified, such specification is exclusive, and all grounds not specified are waived: *Evanston v. Gunn*, 99 U. S. 665; *Belk v. Meagher*, 104 U. S. 279. "If a general objection to evidence is made, but no ground of objection is specified, the objection will not be considered. If a ground of objection is stated, all grounds not specified are considered waived." *Fischer v. Neil*, 6 Fed. 90; see, also, *Wood v. Weimar*, 104 U. S. 795; *Camden v. Doramus*, 3 How. 529; *Burton v. Driggs*, 20 Wall. 183.

But if wrong in these views—as to the sufficiency of the specification of the objection, or as to waiver; and if necessary to set this title up in the answer in order to make it available, notwithstanding its relation back to its inception, or as showing want of title in complainant—the objection is technical purely. The evidence is all before the court, together with the evidence introduced by complainant to meet and overthrow the defense. It is, therefore, a proper case in which to allow the defendant to amend by setting up this supplemental matter and conform it to the proofs. Time to file such an amendment would undoubtedly have been asked and granted, had the objection been brought to the notice of defendant at any time before the final hearing. To reject it now would be only to entail further litigation in another suit. It would not conduce to the due administration of justice to reject this defense now, when all the means are before the court for doing equity between the parties: *Neale v. Neales*, 9 Wall. 1, 8; *Lakin v. Mining Co.*, 11 Saw. 249, 250; 25 Fed. 337; *Zeilin v. Rogers*, 10 Saw. 208; 21 Fed. 103, per FIELD, C. J.; *Coghlan v. Sletson*, 19 Fed. 727.

The same objection is made in the same way to the title of defendant derived from Purcell by deed made since the commencement of the suit, and the same principles are applicable to that defense. But the sale, if valid, was sufficient to show that the title relied on by complainant had been anticipated and cut off without this deed to defendant. But I think the defendants entitled to set up both their defenses in a supple-

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mental answer so as to avoid all questions as to relevancy, and that the bill must be dismissed.

Let defendant have leave to amend by setting up these supplemental matters before the entry of the final decree, and let there be

A decree entered dismissing the bill, with costs.

1. Adverse claimant may show that the applying claim was invalid by reason of location on ground of third party: *Harrington v. Chambers*, 1 Pac. 362.

2. Adverse claim suit may be appealed to U. S. Supreme Court when the value is sufficient: *Chambers v. Harrington*, 111 U. S. 350.

3. Practice where neither party has complied with the law: *Jackson v. Roby*, 109 U. S. 410.

4. Proceeding to trial waives the objection that the complaint was not filed in due time: *Richmond M. Co. v. Rose*, 114 U. S. 576.

5. The land office can not issue patent while the suit is pending, on the ground that it has not been prosecuted with sufficient diligence: *Id.*

6. The filing of the complaint is a commencement of the proceedings to support: *Id.*

7. The complaint should allege citizenship: *Lee Doon v. Tesh*, 18 Cal. 43; *Rosenthal v. Ives*, 15 M. R. 324; *Bohanon v. Hour*, 17 Pac. 583; *Dicie v. Ford*, 19 Pac. 414

8. No adverse need be filed to save the beneficiary under a resulting trust; the patent, when it issues, is for his use: *Hunt v. Patchin*, 35 Fed. 816. See *Lakin v. Sierra Buttes Co.*, 25 Id. 337.

ROSENTHAL ET AL. V. IVES ET AL.

LANSDALE ET AL. V. SAME.

(— Idaho —, 12 Pac. 904. Supreme Court, 1887.)

Adverse claimant must show title as against the U. S. In an action brought in support of an adverse mining claim, it is not enough that one claimant show a superior title, as against the other, but one must show a clear right, as against the government, to a patent from the United States to the claim in dispute, or some part thereof, before either party can prevail in the action.

Only citizens of the United States and persons who have declared their intentions to become such, can acquire rights by location upon mineral lands of the public domain.

¹Citizenship must be pleaded and found. In an action between claimants to determine the right of possession to a mining claim, the plaintiffs must allege and show all the qualifications necessary to entitle them to purchase, among which must be included an allegation that they are citizens, or have declared their intention to become such; and, when the action is tried to the court alone, all these facts must be found, whether admitted by the pleadings or not.

The size of placer claims may be limited by district rule.

As there was an omission to find in these cases that plaintiffs were citizens, or had declared their intention to become such, *held*, that the judgment should be reversed, and the causes remanded, with directions to the court below to find on this question, from the evidence taken at the trial, if sufficient, and, if not upon such evidence as may be adduced, and proceed to render judgment accordingly.

Appeal from District Court, Shoshone County.

CHAS. W. O'NEAL, for Ives and others, appellants.

WM. H. CLAGETT, for Rosenthal and others, respondents.

BRODERICK, J.

These actions were commenced in support of the adverse claims made by the plaintiffs against the issuance of patents to Ives and Silverthorn to the Idaho Bar claim, in Shoshone county, Idaho. The two cases were, by consent of the parties, consolidated, and tried by the court without a jury. The

¹ See note 7, p. 323

court found and adjudged that Ives and Silverthorn were, as against the plaintiffs in each of said cases, the owners of, and entitled to the possession of, a certain portion of the claim, which was described in the judgment; that the plaintiffs in the *Lansdale Case*, were the owners of, and entitled to the possession, as against the defendants, of that portion of the Idaho Bar claim more than eighty rods distant from the west line thereof, which conflicted with the lower half of the Murray location; that the plaintiffs in the *Rosenthal Case* were the owners of, and entitled to the possession, as against the defendants, of all the area in conflict with the upper half of the Murray location; that Ives and Silverthorn be enjoined and restrained from asserting or claiming any right, title, interest, or estate in any of the two parcels herein adjudged to be the property of the plaintiffs in the consolidated cases, respectively, and from prosecuting their application for a United States patent to any portion of said parcels of land.

From this judgment Ives and Silverthorn appeal to this court and assign as error: *First*. That the consolidation and trial of the two cases as one was unauthorized by law and improper, even with the consent of the parties. *Second*. That the findings do not show that Murray (one of the original locators) was a citizen of the United States, or had declared his intention to become such, nor that the plaintiffs in either of said cases were citizens of the United States, or had declared their intention to become such. *Third*. That the findings fail to show that the plaintiffs in either of said cases, or their predecessors in interest, ever complied with the requirements of section 2324 of the Revised Statutes, and the several acts amendatory thereof, as to performing the annual labor required by those acts, during A. D. 1884. *Fourth*. The finding that there was a mining custom in force, at the date of the Ives location, limiting all placer claims in that locality to eighty rods in length to each locator; that no exceptions to this custom were allowed by the custom itself; that the Ives location was made in violation of this custom, and was void as to the excess in length beyond eighty rods from its beginning point.

We will notice these questions in their order.

The consolidation of the cases below for the purposes of the

trial, by the consent of the parties, is certainly no ground for reversal. The defendants were the same in both cases, and the questions involved the same. The consolidation and trial as one case saved costs to all the parties, and, if the order was error, it was without prejudice. At least, there has been no claim here that any prejudice resulted therefrom. In such case a party should not be heard to complain here of that to which he assented in the court below.

The second question, as to the omission to find that Murray or the plaintiffs in either of the cases were citizens, or had declared their intention to become such, is more difficult. It appears from the record that in the *Rosenthal Case* the citizenship of Murray and plaintiffs is alleged, and not denied. In the *Lansdale Case* the citizenship of plaintiffs is alleged, denied by the defendants, and hence put in issue. It further appears that on October 13, 1885, after the rendition of the judgment appellants stipulated in open court that the *Lansdale Case* should "abide and be controlled by all orders, decisions and judgments in the *Rosenthal Case*."

It is contended, on behalf of the respondents, that the judgment in the *Rosenthal Case* should be affirmed (so far as this point is concerned), because the citizenship of Murray and the plaintiffs is admitted, or not denied; and also that the judgment in the *Lansdale Case* should be affirmed, because, under the stipulation, it was to abide and be controlled by the decision and judgment here in the *Rosenthal Case*. In ordinary cases, this point made by counsel would have to be sustained, as it is a general rule, well recognized, that what is admitted by the pleadings is taken as proven, and that which is alleged in the complaint, and not denied by the answer, is considered admitted, as between the parties. But these are statutory actions, brought under an act of Congress, and must be controlled by its provisions. It is true that it is a contest between parties to settle the right of possession to mining ground, but the act provides that, after a judgment is rendered, the party entitled to the possession of the claim, or any part thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general, etc., and make the payments required; "whereupon the

whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear from the decision of the court to rightly possess." The amendatory act of 1881 provides that if, upon the trial, neither party appears to be entitled to the claim in dispute, nor any part thereof, this fact must be found, and judgment rendered accordingly.

From a consideration of these provisions, it is clear that the object and purpose of the action is not only to settle the controversy as between the claimants, but for the information of the officers of the land department of the general government. It is not enough that one party should show the better or superior title, as against the other claimant, but one party must show clearly, as against the government, the right to a patent for the disputed ground, or some part thereof, before either claimant can prevail in the action: *Jackson v. Roby*, 109 U. S. 441; *Lee Doon v. Tesh*, 8 Pac. 625; *McGinnis v. Egbert*, 5 Pac. 653, 660.

The citizenship of Murray and the plaintiffs was pleaded, and we think there should have been a finding upon this allegation of the complaint, notwithstanding the admissions of the defendants. We must not be understood as deciding that in all actions the trial court must find upon allegations which are admitted by the parties, but we limit our conclusions in this regard to this particular class of cases: *North Noonday M. Co. v. Orient M. Co.*, 9 M. R. 529, 1 Fed. 522.

As to the third assignment of error, we think the findings show a sufficient compliance on the part of the plaintiffs with the requirements of law as to performing the necessary labor upon the claim.

This brings us to the fourth and last question to be considered. Was it error to find the existence of a mining custom at the date of the Ives location, limiting all placer claims in that locality to eighty rods in length, and will this finding support the conclusion of law based thereon? Rules and customs of miners, reasonable in themselves, and not in conflict with any higher law, have long been recognized and sanctioned by legislative enactments and judicial decisions. That such rules may still be adopted and enforced as a part of the law of

this country is too well settled to admit of argument. We can not see that the custom in question in any way conflicts either with the acts of Congress, or the laws of the Territory, but, on the contrary, think the custom a reasonable one, and entirely in harmony with the spirit of the laws. Rev. St. U. S., § 2319; Code Civil Proc. Idaho, § 483; *Smelting Co. v. Kemp*, 104 U. S. 652; *Erhardt v. Boaro*, 113 U. S. 535; *North Noonday Co. v. Orient Co.*, *supra*.

We find no error in the record, except the omission to find on the question of citizenship; and, to have this omission supplied, the judgment is reversed, and the causes remanded to the court below, with directions to find upon this question on the evidence taken at the trial, if sufficient, and if not, upon such evidence as may be adduced, and render judgment accordingly.

HAYS, C. J., and BUCK, J., concur.

1. The citizenship of locators is presumed in favor of their grantees without proof: *Garfield M. Co. v. Hammer*, 8 Pac. 153; see *Lee Doon v. Tesh*, Id. 621; 6 Id. 97; 68 Cal. 43.

2. Persons not citizens can acquire no possessory right in a mining claim: *Lee Doon v. Tesh*, 68 Cal. 43; *contra*, *Ferguson v. Neville*, 61 Cal. 356.

3. An alien can not enter, locate or purchase a mining claim: *Tibbitts v. Ah Tong*, 4 Mont. 536.

4. An alien after he has declared his intentions may take advantage of work already done and a record already made: *Craesus Co. v. Colorado Land Co.*, 19 Fed. 78.

5. Aliens may hold stock in mining company: *Princeton Co. v. First Nat. Bank*, 19 Pac. 210.

MCGINNIS ET AL. V. EGBERT.

(8 Colorado, 41. Supreme Court, 1884.)

¹ **Re-location—Relation.** The statute authorizes a change of boundaries in certain cases and a re-location of the claim by the owners; it also makes provision for correcting errors in the original location certificate and when such amendment is made before adverse rights intervene the amendment relates back to the original location.

Location completed after statutory period. A subsequent locator can not object that all the steps necessary to a valid location were not performed at the time of the location provided they were performed before other rights attached. This rule applies to the objection that the claim was not properly staked, or that its record was not made within the statutory period, or that its discovery shaft was not sunk to mineral at the time of its survey.

By statute, prima facie proof of annual labor may be made by affidavit filed within six months after the annual period has expired; construed, to allow such filing within the annual period.

The annual labor affidavit may embrace more than one claim.

If the work is resumed on a claim after it has been open to re-location, but before re-location is actually made, the rights of the original locator stand as if there had been no failure.

² **Annual Labor Act of 1890.** The congressional act of January 22, 1890, fixed the first day of January as the commencement of the annual period for all unpatented claims then existing. The act took effect from the date of its passage. The object of this amendment of the law was to render the annual periods uniform as to all mining claims, and the exemption of claims from the performance of labor for a portion of the year in certain cases was a necessary result of the amendment.

A deed to mining property acknowledged before a justice of the peace of another county without the statutory certificate attached, is not admissible without proof of execution.

Non-identity of names. When a deed in the chain of title is shown running to Jennie Forbes and a deed then offered out of Mary J. Forbes, there is no presumption of identity of persons without proof aliunde to that effect.

Proof of re-location by strangers must be preceded by proof of abandonment by the original locators.

³ **The admissions of a locator against his title made after he has conveyed it away are not evidence to impeach it.**

The verdict in a suit supporting an adverse claim should find affirmatively title in the winning party whether plaintiff or defendant.

¹ *Craig v. Thompson*, 16 Pac. 24, 10 Colo. 517; *McEvoy v. Hyman*, 15 M. R. 397. See *Garthe v. Hart*, Id. 491.

² *Hall v. Hale*, 8 Colo. 351.

³ Otherwise, when made while a claimant: *Harrington v. Chambers*, 1 Pac. 362.

Appeal from the District Court of San Juan County.

The facts are stated in the opinion.

J. W. MILLS, for appellants.

JOHN G. TAYLOR and SAM. P. ROSE, for appellee.

BECK, C. J.

The appellants, McGinnis and Shields, brought this action in support of an adverse claim filed by them against the issuance of a patent to the Winnebago lode upon the application of the defendant, Egbert. The complaint alleges the right of the plaintiffs to occupy and possess said mining claim, or the greater part of it, by virtue of a location of the same on the nineteenth day of July, 1880, under the name of the Little Chief. It alleges that said defendant wrongfully ousted the plaintiffs on the twenty-fourth day of February, 1882.

It is contended that the plaintiffs established on the trial the performance on their part of the various steps necessary to constitute a valid re-location of the property. They filed an original location certificate on the sixth of September, 1880, and an amended location certificate on the eighteenth day of November, following. They also proved the performance of annual labor for the year 1881. The defendant was permitted to introduce in evidence, over the objections of the plaintiffs, an original and an additional location certificate of the Winnebago lode; also deeds of conveyance from the original locator and his grantees, vesting all rights and title acquired under the location of the Winnebago lode in defendant; also proof of the performance of annual labor upon said claim for each year from 1876 to 1881, inclusive.

We will not undertake to discuss all the questions raised by the twenty-nine assignments of error in this case, but will consider such as we deem material to an impartial adjudication of the respective rights of the parties. Upon the production of the original location certificate of the Winnebago lode the following objections were interposed on the part of the plaintiffs:

"(1) The defendant has shown no location of the said lode by erecting a discovery stake and posting a notice, as required

by law, previous to the filing of a location certificate, and by the sinking of a discovery shaft." (2) "The certificate is void for uncertainty, in that it does not describe the claim by reference to some natural object or permanent monument."

It is also urged as a further objection that it was not proved that the boundaries of the claim were staked, as required by law. Being a purchaser of the claim, the defendant may have been unable to prove all the acts which were, in fact, performed by the original locator at the time of the location of the Winnebago lode. The original location certificate was executed by G. H. Merrill, as locator. It states that the location was made on the twenty-ninth of July, 1874, the certificate being filed for record on the twenty-sixth day of September, of that year. None of the defendant's witnesses were present at the location of the claim, or saw it about that time. The witness Curry testified that he visited the claim in September, 1875, and that there was then a shaft upon it about twelve feet deep, which was the only shaft upon the claim. Andrew Forbes testified that he visited it in June or July, 1876, in company with Capt. Graham, from whom he had previously purchased the claim, and that they measured it off at that time, and set permanent stakes at the corners and at the centers of the side lines. He describes the discovery shaft, as it then existed, to be a cut or adit, about twelve or fourteen feet deep, sunk in solid mineral. He says this shaft or adit was located about the center of the claim, and that the vein could be traced right along. He further says that he hired men a few days afterward, and had \$100 worth of labor done in sinking this shaft to a greater depth. The only defect alleged to exist in the location certificate is that it fails to describe the claim with reference to some natural object or permanent monument. There was an attempt to conform to the requirement of the statute in this particular, but the description is too uncertain to be of any practical value. To remedy this defect an additional certificate was filed by Jennie R. Forbes, a grantee of the lode, on the sixth day of October, 1880. If this certificate was proper evidence in the case, it cured the defect in the original.

The only objection interposed to the admission of the additional certificate was that it did not state the number of linear

feet claimed on each side of the center of the discovery shaft. It is not claimed by the defendant that any re-location of the Winnebago lode was made at the time of making and recording the additional certificate. The certificate does not state that a re-location was made. Its purpose was merely to cure the defect mentioned in the original, as clearly appears from its contents. The commencement is as follows: "For the purpose of amending, correcting and more clearly defining the location and boundaries of the Winnebago lode, * * * I offer the following corrected survey." The original certificate stated the number of feet claimed on each side of the center of this discovery shaft, and no change of boundaries purports to have been made by the corrected survey. It appears to be merely *descriptive* of the boundaries as originally established, stating where the corners and stakes are located, and describing the claim with reference to natural objects and permanent monument. The statute authorizes a change of boundaries in certain cases, and a re-location of the claim by the owners. It also makes provision for supplying omissions or amending defects in the original location certificate, and where such amendment is made before adverse rights attach, the amendment relates back to the original location. The same defect which is alleged against the original location certificate of the Winnebago lode, also existed in the original certificate of the *Little Chief*. This was conceded by the filing of an amended certificate by the plaintiffs. The latter instrument, however, was not filed for record until the lapse of several weeks after the defect in the location certificate of the Winnebago claim had been corrected. If, then, it be said that at the time of plaintiff's entry upon the claim no valid location of it existed, on account of said defect in the location certificate, it may be answered that no valid re-location of the claim existed when the defendant's amendments were recorded.

We are of opinion that the defendant was in a position, under the foregoing facts and circumstances, to invoke the rule of decision that a subsequent locator can not object that all the steps necessary to a valid location of the mining claim were not performed at the time of its location, provided they were afterward performed before other rights attached. This rule was applied when objections were raised that claims were

not sufficiently marked upon the ground at the time of the location: *North Noonday M. Co. v. Orient M. Co.*, 6 Saw. 313; *Jupiter M. Co. v. Bodie M. Co.*, 7 Saw. 114. It was likewise invoked in cases of failures to file location certificates within three months after discovery of claims, as required by statute: *Faxon v. Barnard*, 2 McCrary, 44. So, also, it has been held that a failure to sink a discovery shaft to mineral in place at time of survey and location may be cured by subsequently so sinking it. And the same will relate back to the location, and enable the locator to hold the claim against all who had not acquired interests in the lode at the time the acts were performed: *Zollars v. Evans*, 2 McCrary, 39, 43; see, also, 6 Saw. 309. As regards the objection that the testimony did not show a discovery notice had been posted, as required by law, it is sufficient to say that under the circumstances it may fairly be presumed, in favor of a purchaser, that these preliminary steps were performed: *Harris v. Equator M. Co.*, 3 McCr. 14. There was no error in the admission of the location certificates.

To prove the performance of annual labor upon the claim, the defendant relied both upon recorded affidavits and oral testimony. Objections were made to the admission of the several affidavits and exceptions reserved. Plaintiff's counsel strongly insist that the district court committed error in admitting them, for reasons following. One objection urged against some of the affidavits is that they were prematurely filed. Counsel contends that the statute provides an "affidavit period" as well as a "labor period," and that no authority is given to make and record an affidavit of the performance of annual labor, except within this affidavit period. Consequently, if the same is made and filed *before* the period arrives, it is as fatal to its validity as if made and filed *after* the period expires. The language of the statute is: "Within six months after any set time or annual period allowed for the performance of labor or making improvements upon any lode claim, the person on whose behalf such outlay was made, or some person for him, shall make and record an affidavit," etc. Gen. St. p. 725, § 26. Counsel says: "For obvious reasons the language and policy of the law forbid an assessment period to be anticipated by the filing of an affidavit till the

period has expired; then for six months, and no longer, affidavits may be filed." The learned counsel omits to state what the "obvious reasons" are which forbid the making and recording of a labor affidavit until the assessment year or period expires, and we are free to say that such reasons do not occur to us. The object of the statute, evidently, is to preserve evidence of the fact that the annual labor has been performed. It was said in *Belk v. Meagher*, 104 U. S. 283: "The law fixes no time within a year when the work must be done; consequently, if done at any time during the year, it is enough." If, then, the work may be done at any time within the assessment year, and if the object of the statutory provision in question is to preserve the evidence of its performance, it is difficult to comprehend why the evidence may not be taken and preserved as soon as the work is done. The construction insisted upon would be a reversal of the rule that a writing made to preserve the evidence of an event should be made while it is recent and fresh in the memory. It is apparent that the statute contains no such prohibition. Like a statute of limitations, it fixes a limit beyond which the privilege of preserving the evidence by an *ex parte* affidavit is cut off, but requires no time to elapse after the work is done before the affidavit may be recorded.

Another objection made to certain of the affidavits was that they contained more than one lode, and were void for this reason. The argument upon this objection is that the statute is in derogation of the common law, and must be strictly construed. So construing it, no authority is given to include more than a single claim, or part of a claim, in one affidavit. "This is clearly shown," says the counsel, "by the form of the affidavit given in section 1824 in using the words, '*Here describe claim, or part of claim;*' also, '*owner of said claim;*' also '*for the purpose of holding said claim.*'" The argument is illustrated by the ruling of Judge Story upon a deposition, reported in *Bell v. Morrison*, 1 Pet. 355. The act of Congress under which the deposition was taken, provided that the person deposing "shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given after the same shall be reduced to writing, *which shall be done only by the*

magistrate taking the deposition, or by the deponent in his presence." The deposition in question was excluded by the learned justice because "there was no proof, by the certificate of the magistrate or otherwise, that the deposition was reduced to writing in the presence of the magistrate." He says this was a fact made material by the statute, and that every word contained in the magistrate's certificate may be perfectly true, and the deposition may not have been reduced to writing in his presence. The argument, as illustrated, is a *non sequitur*. The material requirements of the affidavit in question are that it describe the claim, or part of claim, containing the name of the owners for whom the work was done, and state the value of the work done.

The statute does not say that an affidavit shall not embrace more than one claim. If more than one is included, it can not be construed into an omission or evasion of any material requirement. Suppose, for example, that an affidavit states that "one hundred dollars' worth of work or improvements were made or performed in the month of July, 1876, on each of the following lode claims, to wit: the 'Winnebago,' the 'Fountain' and the 'J. A. White.'" Does not such affidavit contain a positive averment that labor or improvements of the value of \$100 were made or performed on the *Winnebago* lode at the time specified? Can it be said that every word of the affidavit may be perfectly true, and yet this amount or value may not have been expended on this particular lode? This test shows the argument urged in favor of the strict construction contended for to be unsound. It is possible to so frame an affidavit as to render it evasive in respect to any essential requirement; and in such case the rule stated by Judge Story would apply, and the instrument be excluded as evidence, since no presumptions could be indulged in its favor. There are instances where an affidavit embracing more than one claim would be clearly admissible, as where several claims are held in common. The law of Congress authorizes the whole expenditure in such case to be made upon a single claim, when it is done for the development of all. The affidavit of such expenditure would necessarily embrace the name of each claim, for the development of which the work was done. But the same objections here presented would be equally applica-

ble to that case. It does not answer this suggestion to say that the several lodes, in such instance, may be regarded as a single claim. The claims are, in fact, distinct and separate. They are separately located, have separate names and records, and each claim has its separate boundaries. The only difference in the two cases is that in the latter they lie so contiguous to each other that work done upon one may improve or develop all. This may, however, continue for one or two years only, after which they must be separately worked as in other cases.

We do not think this objection well taken. Upon the production of an affidavit of Andrew Forbes, offered to prove performance of annual labor on the Winnebago lode for the year 1876, the objection made was: "It shows that the work was not done in any one assessment year, but in parts of two assessment years." This affidavit was made on the sixth day of September, 1876, and stated that the work was performed in the months of July and August of that year. The assessment year at that time expired as to this claim on the twenty-ninth day of July. As no forfeiture was declared for failure to perform labor for either of the years 1876 or 1877, the objection is immaterial. It may also be observed that there was oral proof which the jury may have deemed sufficient to warrant a finding that the annual labor was duly performed for the year ending July 29, 1876. But if it be true that the claim was open to re-location at the expiration of said assessment year, the facts appear that it was not then re-located, and that work was afterward resumed by the owners.

It was said in *Belk v. Meagher, supra*, "If work is resumed on a claim after it has been open to re-location, but before re-location is actually made, the rights of the original locators stand as they would if there had been no failure." The adverse rights claimed by the plaintiffs are alleged to have accrued on the nineteenth day of July, 1880. The important inquiry, therefore, is, was the Winnebago lode open to re-location at that date? Two labor affidavits were introduced by the defendant, which bear upon this inquiry, as follows: (1) Affidavit executed by S. W. Raymond, September 8, 1879, stating that \$100 worth of work was performed upon the claim for the year ending August 10, 1880; filed for record Septem-

ber 9, 1879. (2) Affidavit executed by S. W. Raymond, December 9, 1880, stating that \$100 worth of labor was performed for the year ending December, 1880; recorded December 13, 1880. The work mentioned in the first affidavit was evidently performed after the twenty-ninth day of July, 1879. Plaintiff's counsel says the assessment year, when this affidavit was filed, began and expired as to this claim on the twenty-ninth day of July. The work stated therein to have been performed would, therefore, protect the claim from forfeiture until the twenty-ninth day of July, 1880, a time subsequent to the entry of the plaintiffs.

The objection to the affidavit, that it misstates the expiration of the assessment year, can not be sustained, for two reasons: *First*, because the statute does not require this fact to be stated; *second*, for the reason that the assessment period as to this and other claims was changed by an act of Congress before the expiration of the year. The congressional act of January 22, 1880, fixed the first day of January as the commencement of the annual period for all unpatented claims then existing. No time being mentioned in the act for its taking effect, the rule stated in *Matthews v. Zane*, 7 Wheat. *211, applies, and it took effect from the date of its passage. Its effect, therefore, in the present instance, was to extend the assessment year from July 29, 1879, to December 31, 1880. The object of the amendment of the law was to render the annual periods uniform as to all mining claims, and the exemption of claims from the performance of labor for a portion of a year, in certain cases, was a necessary result of the amendment. Wade; Amer. Min. Law, p. 54, § 29; Sick. Min. Laws 1881, p. 393. Both affidavits show the performance of labor within the year as extended by the act of Congress; and if the statements contained therein are true, the claim was not open to re-location on the nineteenth day of July, 1880.

In regard to the instructions prayed on the part of the plaintiffs, no one of them can be held to be correct as to all the propositions therein contained, and the court did not err, therefore, in refusing them. It was the duty of the court to give proper instructions to the jury upon the legal propositions involved, but we are not advised whether this duty was performed or not, since the transcript does not inform us what

instructions, if any, were given. Up to this point we have considered the points raised and the rulings of the court upon the theory that defendant had regularly succeeded to the rights of the original locator of the Winnebago lode. It appears, however, from the transcript of the record, that this fact was not shown by legitimate testimony. A quit-claim deed purporting to have been executed by G. H. Merrill, the original locator, bearing date November 17, 1874, and conveying the claim to C. H. Graham, was admitted in evidence over the objections of the plaintiffs. This deed was acknowledged before a justice of the peace in a different county from that in which the claim is situated, and no certificate to the official character of the officer taking the acknowledgment, or to the genuineness of his signature, was attached, as required by the statute in such case, nor was any other proof of the due execution of the deed offered. The acknowledgment of this deed not having been properly authenticated, the deed was not admissible in evidence without further proof of its execution. It is excluded by the express language of the statute, which is as follows:

* * * "Neither the same, nor the record thereof, shall be read as evidence, unless subsequently acknowledged or proved according to law, or unless their execution be otherwise proved in the manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof." Gen. St. p. 175, § 20.

Another exception reserved to the admission of title deeds was to the admission of the deed from L. T. Wright to Jennie Forbes. The defendant derives title by a conveyance from Mary J. Forbes. The court should have required some proof that these names described the same person. We would observe in this connection that the additional location certificate of the Winnebago lode purports to have been executed by *Jennie R. Forbes*. If these several names were intended to describe the same person, that fact ought to be made to appear by competent proof. The ruling of the court rejecting the plaintiffs' offer to prove by the witness O'Brien that he re-located the premises as abandoned property in 1877, was correct. The title to a mining claim can not be impeached in this way. Had the proper foundation been laid, by proving that the

claim had been abandoned by its owners, the testimony might have been admissible; but the *prima facie* case made by the defendant could not be rebutted by proof of the character offered. Proof that a stranger to the controversy appropriated as his own a claim which had been located, possessed, and improved by another, basing his right so to do upon a forfeiture of the rights of the original owner, would afford no presumption that the appropriation was lawful.

The excluding of the declaration of Merrill, the original locator of the Winnebago claim, made after parting with his rights thereto, and offered to impeach the validity of the location made by him, was clearly correct. The plaintiffs' offer to prove the location of the Florence claim in 1875 by said Merrill and one Biedell upon a portion of the premises in controversy, was also properly excluded for the reasons given, and because no proper foundation was laid to render such testimony material. One of the points urged as entitling the plaintiffs to a new trial, and as showing that the court erred in denying the motion therefor, is that the testimony established the fact that the discovery shaft of the Winnebago lode, as originally located, is not upon the ground now claimed by the defendant as constituting said lode claim. If this point was not submitted to the consideration of the jury it should have been. The defendant's title depends, under the issues, upon the validity of the original location, as perfected by subsequent acts performed before the attaching of adverse rights, including the filing of an additional location certificate. If, therefore, the boundaries of the claim, as originally located, were changed after the recording of the original location certificate so as to leave the discovery shaft outside, the validity of the location can not be sustained, for the reasons that the additional location certificate neither purports to be a re-location of the claim, nor is it sufficient in form and substance to support a re-location involving such a change of boundaries.

As regards the errors assigned concerning the form of the verdict of the jury, we think the objections well taken, and that the verdict was insufficient to cover the issues involved in a trial of this character. The proceeding is authorized, and to a certain extent, regulated, by section 2326 of the act of Congress of May 10, 1872. This section makes it the duty of

a person filing an adverse claim against the issuance of a patent, within thirty days thereafter, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession. As the law then stood, the party in whose favor the judgment was rendered became entitled to a patent. But the section was so amended by the act of March 3, 1881, that neither party was entitled to a judgment in his favor unless he was, at the time of the adjudication, entitled to a patent for the premises in controversy by virtue of a compliance with the mining laws. If neither party establishes such a right, the jury is required to find that fact, and the proceedings in the land office are stayed until a title is perfected.

It is plain, therefore, that the object of the suit is for the information of the officers of the general government, and that the proceeding must be conducted in accordance with the statute which authorizes it. The objection to the verdict is that it does not find that the defendant is entitled to the possession of the Winnebago lode claim by virtue of a compliance with the statutes of the United States and the State of Colorado. The verdict is as follows: "We, the jury in the case of *Edward McGinnis and Frank P. Shields, Plffs.*, v. *William Eybert, Defendant*, do find a verdict for the defendant in the above case." The defendant being in possession, this verdict conveys no information whether it was returned for the defendant because he had established his title to the lode in manner above indicated, or because the plaintiffs had failed to establish their title to the Little Chief. If returned for the latter reason, it should have so stated; and if for the former, that fact should have been stated therein. For the errors mentioned, the judgment is reversed, and the cause remanded.

Reversed.

DU PRAT, Executrix, v. JAMES ET AL.

(65 California, 555. Supreme Court, 1884.)

Entry to re-locate no trespass. The failure of the locator of a mining claim to perform his annual labor subjects the claim to re-location, and a peaceable entry in good faith may be made for that purpose, although the claim is occupied by the original locator.

¹ Performance of the specified amount of labor annually is a condition which must be complied with, and failure on the part of a locator to perform such work will forfeit his right to hold such claim.

Labor before re-location. The original locator of a mining claim has a right to perform the labor after the failure, and still have the benefit of his location, if the labor is done before re-location.

²Traveling expenses—Lost time—Search for water. Expenditure of money and time in traveling about regarding matters connected with a mining claim, are in no sense labor performed on the mine.

Evidence of location. Prominent and permanent monuments, and stakes at the corners, properly posting notices, and distinctly marking the location on the ground, sufficiently establish the location and boundaries of a mining claim; but whether or not a sufficient location has been proved is a question of fact.

Department 2. Appeal from a judgment of the Superior Court of Tuolumne County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

TAYLOR & HAIGHT, for appellant.

STREET & STREET, for respondent.

MYRICK, J.

This is an action to recover possession of a mining claim in Tuolumne county. The action was commenced in April, 1881, by J. J. Du Prat as plaintiff. He having died after the judgment in the court below, his executrix was substituted. For convenience, the deceased is herein spoken of as plaintiff. The judgment was in favor of defendants.

On this appeal, on behalf of plaintiff, points are made as follows:

¹ *Ducie v. Ford*, 19 Pac. 414; *Erhardt v. Boaro*, 15 M. R. 473.

² *Remington v. Bandit*, 9 Pac. 819.

First. Defendants having entered on an actual possession of plaintiff, their entry can give them no right as against him. The facts in this regard, as found by the court, are substantially as follows:

The plaintiff and his predecessors in interest had, from 1863 down, worked the mine, and had expended, in sinking shafts and mining tunnels, over \$9,000, and were in the possession of the mine from its location down to the time of the entry of defendants. In the years 1875, 1876, 1877, 1878 and 1879, plaintiff caused the requisite amount of labor, under the act of Congress (Rev. St. U. S. § 2324), to be performed; but in the year 1880 plaintiff caused but nine dollars' worth of work to be performed on the claim. On the first day of January, 1881, the defendants James and McCartea entered peaceably and in good faith upon the premises in controversy, for the purpose of locating a mining claim, and located a portion of said premises by posting notices and erecting monuments, which location was distinctly marked on the ground, so that its boundaries could be readily traced. On the fifth day of January, 1881, the written notices of location having been defaced by rains, the defendants James and McCartea renewed the notices, and reset the stakes at the corners, and built stone mounds around the same at the corners thereof. On said first day of January said defendants above named went into the possession of the claim located by them, and have ever since so remained, and have been continuously at work thereon, and expended about \$1,000 in each of the years 1881 and 1882. On the fifth of January, 1881, the defendants Ellis and Sutton entered peaceably and in good faith upon the mine in question for the purpose of locating a mining claim, and located a claim embracing a portion of the premises in controversy, and posted notices and drove stakes and erected monuments, and distinctly marked the location on the ground, so that its boundaries could be readily traced. On the same day said defendants went into possession of the ground claimed by them, and were in the actual and exclusive possession thereof during the years 1881 and 1882, and performed labor in and upon their said claim in 1881 to the value of \$300; in the year 1882 they performed the amount of labor thereon required by the act of Congress of May 10, 1872.

It has been held by the Supreme Court of the United States, and by this court, that a person can not enter upon the actual possession of another for the purpose of laying foundation for a pre-emption claim to public lands of the United States; and it is claimed by the appellant that the same principle operated upon the parties to this controversy, and the defendants could not lawfully enter upon the possession of the plaintiff and make a valid location, nor acquire any right as against the plaintiff; that the defendants could not, by a trespass, lay a foundation for obtaining the benefit of the act of Congress for the location of mining claims. The cases of *Eilers v. Boatman*, 3 Utah, 159, and *Weese v. Barker*, 7 Colo. 178, are cited to support this view; but we think a close examination of the act of Congress (Rev. St. U. S. §§ 2322, 2324) shows the reverse to be the better view. After declaring, in section 2322, that the locators of all mining locations, *so long as they comply with the laws of the United States*, and with the State, territorial and local regulations not in conflict therewith, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, etc., and after declaring, in section 2324, that a certain amount of labor shall be performed in each year, it is provided in section 2324 that, "upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made."

It seems from the foregoing that plaintiff's only right to the possession depended upon the performance, annually, of the specified labor; and, the labor being unperformed, the ground was open to re-location. The act of Congress does not say the ground shall be open to re-location if the labor be unperformed *and* if it be unoccupied; on the contrary, as above said, it is open to re-location if the labor be unperformed.

It is urged that the clause of section 2324, giving to the original locator the right to perform the labor after the failure and before the re-location, gave him the right (as against the re-locator) to remain in possession and exclude all others. The logical result of that proposition would be to annul the requirements for the performance of the labor, for if he may

remain and prevent re-location for one day, he may for a year; he may for an indefinite period. Congress had the power to impose such conditions on the right to the possession of the public lands as it saw fit; and we think such conditions must be complied with. It will be observed that the entry of the defendant was peaceable and in good faith. The right of the original locator to perform the labor after a failure, and have the benefit of his location, is dependent upon his having performed the labor *before* the re-location.

Second. Plaintiff insists that he performed the work required, and therefore did not forfeit his right to hold the ground. The court found that he performed in the year 1880 three days' labor, of the value of three dollars per day, and no more. The plaintiff claims that the court erred in excluding from its conclusion as to labor performed on the claim his time and expenses spent and incurred as follows: In October, 1879, plaintiff leased a mill located about a quarter of a mile from his claim, and from that time until December 25th made unsuccessful efforts to obtain water to operate the mill. About the latter part of December, 1879, or the first of January, 1880, the company owning a ditch let sufficient water run to the mill for the use of plaintiff, but he did not use or attempt to use the same, nor crush or attempt to crush rock or ore. Plaintiff went from Groveland to Sonora, in said county, twice, from Groveland to San Francisco once, and from Oakland to San Francisco five or six times, to see the agent of the water company for the purpose of getting water to operate the mill. His personal expenses incurred, and the value of his time on those occasions, were from one hundred and fifty to four hundred dollars. We think that in no sense can these expenditures and values be said to be labor performed on the mine.

Third. Plaintiff asserts that the locations of the defendants were invalid. The court found that notices were posted by the defendants on their respective locations (copies of the notices are given in the findings), and that stakes were driven firmly in the ground at the corners, and stone monuments placed around the same, and that the stakes were marked as corner stakes. The court also found that the defendants distinctly marked the locations on the ground, so that the bound-

aries could be readily traced, and that the stakes placed at each of the four corners were firmly planted in the ground; and that the stakes and stone mounds built around the same were prominent and permanent monuments, by which and the descriptions in the notices, the claims could be identified. Plaintiff urges that the corners only were established, and that no side or end lines were in any way laid down. The provision of the statute being that the "location must be distinctly marked on the ground so that its boundaries can be readily traced," (there being no specific direction as to how the marking is to be done,) and the court having found that the stakes and mounds at the corners were prominent and permanent monuments by which, and the descriptions in the notices, the claims could be identified, and also having found that the locations were distinctly marked on the ground, so that the boundaries could be readily traced, we do not see any failure on the part of defendants to comply with the requirements of the statute. Whether or not, from the objects placed by the defendants, the boundaries could be readily traced, was a question of fact for the court below.

The *fourth* point relates to alleged variations in the descriptions of the ground located, as between the answer and the testimony. We do not see any substantial variation. Whatever appears is more apparent than real.

Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

RENSHAW V. SWITZER.

(6 Montana 464, 13 Pac. 127. Supreme Court, 1887.)

¹ Failure to do annual labor must be specially pleaded. In ejectment to recover a mining claim it is sufficient for the claimant to show a valid location. He need not also set out that he has done the work necessary to represent the claim; the failure to do such work should be shown by the other party. The grant evidenced by a valid location continues operative to protect the ground from a subsequent location, until the title thereby acquired has become forfeited by a failure to do the necessary work or otherwise; and such matters of forfeiture, by which the claim is to be defeated, must be specially pleaded.

When the giving or refusing of instructions is excepted to all the instructions given or refused should be contained in the record.

¹ *Dutch Flat Co. v. Mooney*, 6 M. R. 303; *Mt. Diablo Co. v. Callison*, 9 M. R. 617; *Morenhaut v. Wilson*, 1 M. R. 53.

Appeal from Second District, Silver Bow County.

KNOWLES & FORBIS, for respondent.

WADE, C. J.

This is an action in the nature of ejectment to recover the possession of the Burner lode mining claim situate in the Summit Valley mining district, Silver Bow county. There was a motion for a nonsuit, upon the ground that the plaintiff had failed to prove that any work had been performed on the Burner lode claim after its location, which motion was overruled, and this action of the court is one of the errors complained of.

We have many times decided that the valid location of a mining claim is a grant, from the government, to the person making the location, of the claim located, and carried with it the right, by a compliance with the law, of acquiring a full title. The location is the inception of the grant, and the patent is its consummation. The grant is kept alive by representation, as the law provides. A failure to represent forfeits the grant, and makes void the title acquired by a valid location. Upon such failure, the ground becomes again subject to location and purchase. But, in order to validate a subsequent location, it must be established that the prior grant has become forfeited. The grant evidenced by a valid location continues operative and in full force, so as to protect the ground from a subsequent location, until the title thereby acquired, by a failure to represent or otherwise, has become forfeited. A valid location, and the grant thereby evidenced, remains in full force and effect until something is alleged and proved against it to defeat the grant. It follows, therefore, that matters of forfeiture whereby the title to a mining claim location is defeated, must be set forth in the complaint or answer. They can not be proved unless they are alleged. Forfeiture is something whereby a title is to be defeated or set aside. It is that upon which the second claimant bases his right of location. He must allege and prove on the trial that the right of the first locator is gone before his location can have any validity. There does not seem to be much doubt but matters of forfeiture must be pleaded, and this doctrine is fully recognized in *Garfield M. Co. v. Hamner*, 6 Mont. 53, 8 Pac. 153.

There is no allegation of the forfeiture of the Burner claim, by a failure to represent or otherwise, contained in the answer of appellant. Therefore no proof as to work done on the claim after the location would have been competent. If the appellant had desired such proof, he should have made the proper allegation. If he had wished to show a forfeiture of the claim, and of the respondent's interest therein, by a failure to represent, he should have alleged the same in his answer. It was not for the respondent to show that his claim had been represented. His title was good after showing a valid location, and he was entitled to the possession of the claim, unless the appellant defeated such title, which he might have done if he had alleged, and could have proved, a forfeiture, by showing that the necessary work to represent the claim had not been done.

The record contains only such portions of the instructions as were excepted to by the appellant. This is not a fair presentation to this court of the instructions given below. We should have an opportunity to examine all the instructions and to look at them as a whole. It often happens that the substance of a refused instruction has been given in another, and, unless all the instructions are before us, a case might be reversed and remanded for a new trial for the refusal to give an instruction which, in fact, had been given in substance in another instruction. Whenever the giving or refusing of instructions is excepted to, all the instructions given or refused should be contained in the record. The fragment of the instructions contained in the record, which were asked for by the appellant and refused by the court, are based upon the same theory as his motion for a nonsuit, and are not supported by either authority or a just interpretation of the law of Congress upon the subject of acquiring title to mining claims on the government lands. That law declares the public mineral lands of the United States free and open to exploration and purchase. The discovery and location of a claim in pursuance of that law is equivalent to a contract of sale and purchase where the purchaser is let into possession and becomes entitled to a deed from the vendor upon the payment of the purchase price. The locator becomes entitled to the exclusive possession and enjoyment of the claim located, and upon the payment of the purchase price, that is, upon the payment of the required amount per acre, and the necessary amount of work

upon the claim, he becomes entitled to a deed—a patent, which is the government deed—to the ground within the boundaries of his location. And, if the contract of sale and purchase is to be defeated because of non-compliance with its terms, the fact showing such non-compliance must be alleged and proved. The property does not become subject to sale by the government to any other purchaser until the title or right already granted has become forfeited, and this forfeiture must be established by allegation and proof.

The judgment is affirmed with costs.

Judgment affirmed.

MCLEARY, J., and BACH, J., concur.

PHARIS V. MULDOON.

(17 Pacific, 70. California Supreme Court, 1888.)

¹ **Re entry by original claimant before re-location complete.** Defendant's claim became open to re-location January 1, 1886, and at 1 A. M. plaintiff posted his notice. He did not, however, mark his boundaries until January 5th, and defendant, on January 1st, at the usual hour in the morning, resumed labor, did work to the amount of \$10 up to January 5th, and \$200 during that year. *Held*, plaintiff's proceedings, not amounting to location before work was resumed, conferred no right upon him.

Commissioners' decision. Department 2. Appeal from Superior Court, Amador County; C. B. ARMSTRONG, Judge.

Defendant, E. Muldoon, on July 14, 1884, located the claim in controversy, but during the year of 1885 expended thereon no more than \$60. Plaintiff, Alfred Pharis, claiming under a re-location made on January 1, 1886, brought this action to quiet title. Judgment was entered for defendant, and plaintiff appeals.

CURTIS H. LINDLEY and D. B. SPAGNOLI, for appellant.

EATON & RUST, for respondent.

FOOTE, C.

¹ See *Belk v. Meagher*, 1 M. R. 510; *Little Gunnell Co. v. Kimber*, Id. 536.

Action to quiet title to a mining claim. It is found by the court, and assumed by counsel upon both sides, that the claim of the defendant was not open to re-location until January 1, 1886. At 1 o'clock A. M. of that day plaintiff posted his notice, but did not mark out his boundaries until January 5th. In the meantime, that is to say, at the usual hour of commencing work of that kind, on the 1st day of January, 1886, the defendant resumed labor on his claim, did \$10 worth of work on it up to the 5th of January, 1886, and afterward, during that year, performed labor upon it to the amount of \$200 more. The marking of boundaries is a necessary part of the location, (*Newbill v. Thurston*, 65 Cal. 419,) and this was not done until January 5, 1886. The defendant had resumed work "after failure and before location." This being the case, the plaintiff's proceedings conferred no right upon him, (*Belcher M. Co. v. Deferrari*, 62 Cal. 162,) even if we concede what we are not prepared to admit, that an entry by stealth at 1 o'clock in the morning is within the contemplation of the act of Congress. (Section 2324, Rev. St. U. S.) The other points made require no special notice. It results that the judgment should be affirmed.

WE CONCUR: BELCHER, C. C.; HAYNE, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

1. A house for the use of the miners, two hundred feet away from the claim, can not be counted as annual labor: *Remington v. Bandit*, 9 Pac. 819.
2. Any work done for the purpose of discovering mineral is improvement within the spirit of the statute: *U. S. v. Iron Silver Co.*, 24 Fed. 568.
3. Annual labor is required on placers: *Carney v. Arizona M. Co.*, 65 Cal. 40; *Morgan v. Tillotson*, 15 Pac. 88.
4. District rules concerning, are superseded by act of Congress: *Original Co. v. Winthrop Co.*, 60 Cal. 631.
5. Work prior to the act of May 10, 1872, can not be counted as annual labor: *Thompson v. Jacobs*, 2 Pac. 714.
6. One who has failed to do his work may re-enter and resume before other rights attach: *Lakin v. Sierra Buttes Co.*, 25 Fed. 337.
7. As to work done on one of several claims, see *Chambers v. Harrington*, 111 U. S. 350; *St. Louis Co. v. Kemp*, 11 M. R. 673; *Mt. Diablo Co. v. Callison*, 9 M. R. 617.
8. If grantee fail to perform annual labor grantor may re-locate: *Blake v. Thorne*, 16 Pac. 270.

WILLIAM PHIPPS ET AL., Appellants, v. THOMAS HULLY, Respondent.

(18 Nevada, 133. Supreme Court, 1883.)

Ore contract calling for battery assay. Where a contract between miner and mill-man provides that the ore should be paid for at the value found from the battery samples, the incorrectness of such assays may be shown by any competent testimony showing the true value of the ore.

The object of an assay is to give the true value of the ore and the assay called for in the contract may be shown to be erroneous by assays otherwise taken, and by the clean-up.

But if the assay be correct it controls the clean-up on a percentage contract.

Evidence of value of ore from other places in the same mine is of little value in ascertaining the contents of any lot in question; whether-competent at all, not decided.

¹ An assay is the test of the value of a specimen or quantity of ore by the extraction of the amount of silver, gold or other metal, contained in a minute fraction, which amount is supposed to be proportionate to the whole amount found in the quantity from which the fraction was obtained. Supposing the assay to be correct, its importance in determining the quantity of metal depends on the size of the lot from which it was obtained, and the manner in which such lot was selected. What are called specimen assays are of no value whatever, further than to show the contents of the identical specimen from which made, but are often used to deceive persons ignorant in such matters.

While the assay shows only the contents of that portion of ore that has been assayed, its importance lies in its acceptance as indicating the contents of other ore of which the portion assayed was a "sample."

Between ore-buyer and ore-seller ore is usually sampled by the former under supervision of the latter; this sample (pulverized) is divided into portions—one for the buyer, one for the seller, and one to be kept for reference in case of difference between the other two. The third division is often omitted. After division, each portion is in itself a sample. Both buyer and seller have a control assay (assay in duplicate) made of their respective samples, the assay of the seller being also a control assay in regard to the assay of the buyer.

The results of carefully made assays of a sample should not differ more than one per cent. nor should samples of the same ore differ more than two per cent. In case of excessive variation in assays, one or both samples are assayed by a third party as referee, for accuracy of assay. In case of excessive variation of samples and failure of third sample to conform to either of the first two, ore is usually re-sampled. *Morrison's Mining Rights*, 6th Ed., 201.

Appeal from the District Court of the First Judicial District, Storey County.

The action was upon a contract with reduction works which called for sixty-five per cent. of the assay value, battery samples. The evidence showed a great disproportion between the battery samples and the pulp samples, and a clean-up much less than either assay should have produced. Judgment went for plaintiffs, but for a sum based on defendant's theory of the case, from which judgment plaintiffs appealed.

The assay certificates which were proved and introduced in evidence, contained the following printed form of caution:

"It is perilous to trust any assay report which is based upon a single assay, no matter how carefully or by whom made. No evidence is so satisfactory of the correctness of an assay report as the agreement of two proper assays of the same pulverized sample. All ore assays not specially otherwise ordered are understood to be of this character. When no interests are dependent, and when certainty as to the precision of a report is not important, a single assay may be sufficient. Ore samples from a distance (three ounces is a sufficient quantity) may be sent prepaid by mail or express. It is reasonable to look for agreements in assays from the same ore, made by different assayers, only when the sample has been previously pulverized and thoroughly mixed, after being sifted through the finest sieve. Pulp which has passed the first battery screens (as well as coarsely broken ore and tailings) may have a very deceptive sample sifted out of it. Parties who do not wish to be misled by assay reports as to the value of their ores, pulp and tailings, should assure themselves that the assayer has faithfully operated upon a sample which truly represents the ore, and that he has not 'estimated' (guessed) the gold contents, or assumed (without testing for it) that gold is not contained at all."

M. N. STONE, for appellants.

W. E. F. DEAL and B. C. WHITMAN, for respondent.

By the Court, HAWLEY, C. J.

This action was brought by plaintiffs to recover \$2,095.60, alleged to be due from the defendant on a contract for reducing certain ores at defendant's mill. The contract, as averred in the complaint, required defendant to pay plaintiffs—after deducting \$6.50 per ton for expenses of reduction—"sixty-five per cent. of the assay value of said ores, such assay to be made from said ores taken from the battery samples at said mill." It is alleged that the ascertained value of said ores, by the assays taken from the battery samples, was the sum of \$134 per ton.

The defendant, in his answer, alleges that "he was to pay sixty-five per cent. of the battery samples assay, less six dollars and fifty cents for working and less discount on the bullion produced." He avers that he reduced twenty tons of ore and "admits that battery samples of such workings were made," but denies that they were duly or properly made, and says: "that either by fraud of plaintiff Cizovich, or mistake by defendant's employes, they failed to show the assay value of such ores." He "admits that such assays apparently showed the value of such ores or matter to be \$134 per ton, but avers that the real value was not more than \$14.60 per ton." He also avers "that the entire product of such ore, * * * by him carefully and properly worked at his mill, was no more than \$180."

The cause was tried before the court without a jury and judgment was rendered in favor of plaintiffs for \$265, or its equivalent in gold and silver bullion.

1. We are of opinion that the averments in the answer raised an issue as to the terms of the contract and also as to the correctness of the assays which were taken from the battery samples.

2. It was argued by plaintiffs that the assays taken from the battery samples were the only tests provided in the contract for determining the value of the ore, and hence that the court erred in admitting any other testimony for the purpose of establishing its value. By the terms of the contract the assays from the battery samples were to be taken as a means of ascertaining the value of the ore; but this was, of course, upon the understanding of the parties that the assay would be correct. It never was the intention of the parties that they

should be bound by the assays if they did not fairly represent the value of the ore. The language of the averments in the pleadings, when interpreted with reference to the intention of the parties, is not susceptible of such a construction. It was the true value of the pulp from the battery that was to be taken as a guide for the settlement. Contracts of this character are presumed to be made with a view of protecting both parties. The owner of the ore is guaranteed a certain per cent. of its true value, which seems to him a fair return. If the mill-owner is careful, and works the ore closely, he may be able to save more than the per cent. agreed upon, and thus secure to himself an additional profit for the working of the ore. He also avoids the necessity of a clean-up for every small quantity of custom ore that he may work, and is thereby enabled to crush and reduce the ore at less expense than if the contract called for the bullion produced by the ore. If the assays taken from the battery samples are correct, the parties are protected and bound by them whether the clean-up, if made, amounts to the percentage agreed upon or not. But if the assays are not correct the parties are not bound by them, and may introduce any competent testimony tending to establish the true value of the ore.

3. Upon the trial plaintiffs introduced two assays taken from the battery samples—one taken under the direction of the defendant of \$134.82 per ton, the other taken under the direction of the plaintiff Cizovich, of \$128 per ton. About half the ore had passed through the battery when the assay of \$134.82 was obtained. It is argued in behalf of plaintiffs that defendant was negligent in not then taking the necessary steps to secure himself by having other samples taken from the battery, and seeing that proper and correct assays were made therefrom, or in not refusing to reduce the balance of the ore unless the mistake in the assays taken was corrected in some manner that might be agreed upon between the parties. It is also claimed that the testimony introduced on the part of the defendant was incompetent to prove the real value of the ore, or to show that the assay value of the ore was less than shown by the assays taken from the battery samples. It would have been proper for the defendant to have pursued the course suggested, but it was not necessarily the only course to be pur-

sued in order to ascertain the facts. The defendant seems to have used due diligence in notifying plaintiffs that something was wrong about the assays, and in endeavoring to find out what the true value of the ore was. He testified that after he ascertained from the assayer what the battery samples assayed he asked plaintiff Phipps for time to settle, "because the amalgam produced by the ore showed that the ore was not of the value that the assay of the battery samples showed." When he showed plaintiff Cizovich the assay he told him "it was too high." Phipps said, "Hully informed me that the assays went \$134 per ton, and he then expressed some surprise that it went so high, and asked whether I was not surprised; he also said that, if we were not in a hurry, he would like to have us wait until he could make a clean-up before making a settlement with us." It does not appear that either of the plaintiffs objected to waiting for the "clean-up." Neither of them requested that any other assays from the battery samples should be made. Both parties had an equal opportunity to correct the mistake in the battery sample assays, and to pursue any course necessary to preserve their respective rights. After the assay of \$134.82 was made defendant took a pulp assay from the tank "because evidences were cropping out that the battery assays were too high." He testified that he told Cizovich after he received the battery sample assays that he "did not believe that the ore was of any such value, because the gold in the ore, as shown in the battery samples assays, predominated in so much greater proportion than the gold in the bullion which the ore produced, as shown by the assays taken from the tank. The pulp from the tank assayed \$16.89 per ton.

The defendant worked 2,700 pounds of ore belonging to himself with plaintiffs' ore, and the entire clean-up at the mill of all the ore, only produced a bar of bullion of the value of \$265. Bossell testified on behalf of defendant that he was an amalgamator by occupation, of fourteen years' experience; that he had charge of the working and reduction of the ore; that it was properly worked; that he took as fair a sample as he could from the tanks; that the amalgam out of the pans "represented the entire product of the ore which plaintiffs sent to the mill;" that he "did not intend to clean up, but

the difference between the assays from the battery and the assay from the tank was so peculiar that Mr. Hully told me to clean up;" that the sample taken "from the tank had the results of no other ore except plaintiffs';" and that he did not think it possible that they "could have made a loss in milling this ore of the difference between \$265 and \$2,000." This testimony was competent, as it tended to show that the assays from the battery samples were not correct; and also tended to show what the true value of the ore was.

It is claimed that the court erred in allowing testimony as to the value of ore at other places in the St. John mine than that from which plaintiffs' ore was taken. We deem it unnecessary to decide whether this testimony was competent or not. It certainly was of but little, if any, value in determining the fact at issue, and it is apparent to us from the record that plaintiffs were not prejudiced by it, and that the judgment would have been the same if it had been excluded. The error, if any, is not of sufficient importance to justify a reversal of the judgment: *Merle v. Mathews*, 26 Cal. 467; *Persons v. McKibben*, 5 Ind. 261; *Williamsburg City Ins. Co. v. Cary*, 83 Ill. 454; *Albin v. Kinney*, 96 Ill. 216.

The judgment of the district court is affirmed.

MILLER V. MICKEL.

(9 Colorado. 331. Supreme Court, 1886.)

A bank has no right to charge a company overdraft to the personal account of the treasurer. Nor is he liable for a draft cashed at his request, to the company, which is afterward dishonored.

Appeal from the District Court, Summit County.

Action brought by the appellee, Mickel, against the appellant, Miller, the owner and proprietor of the Miners' & Merchants' Bank of Breckenridge, Summit county, Colorado, to recover on a book account for services rendered by said Mickel, at the instance of Miller, and to recover the balance of a bank

account at defendant's bank. There was a direct conflict of evidence, on which the court, sitting without a jury, gave judgment in plaintiff's favor. The only point considered on appeal is the refusal of defendant's counter-claim to be allowed credit against the plaintiff for \$180.53, the amount of an overdraft on an account which plaintiff had opened in the defendant's bank as treasurer of the Sallie Barber Mining Company, which defendant, claiming the right to hold plaintiff personally liable, had transferred from plaintiff's private account to balance the overdraft on the Sallie Barber Mining account. On this point it appears that plaintiff had deposited, as treasurer of the Sallie Barber Mining Company, in the defendant's bank for collection, a draft on a member of said company, with instructions to advise plaintiff if it was not paid on a certain date, after which plaintiff would check against it as treasurer. Defendant, by mistake, sent the draft to New York instead of Denver, and, receiving no telegram from Denver notifying protest, told plaintiff he was satisfied it would be paid, and plaintiff checked against it for the benefit of his company.

BREEZE & BREEZE and T. C. EARLY, for appellant.

J. W. HORNER and PETER PALMER, for appellee.

ELBERT, J.

This is a case of conflicting evidence. The plaintiff and the defendant were the only witnesses to the principal issues, and contradicted each other with regard to many items of the account sued upon. The court was the judge of their credibility, and an examination of the record discloses no grounds for the reversal of the finding and judgment as being against the weight of evidence.

The chief objection urged here is the refusal of the court below to allow the defendant credit against the plaintiff for the \$180.53 overdraft on the account of the Sallie Barber Mining Company. The checks drawn by the plaintiff against the Sallie Barber Mining Company's account were, without exception, signed by him in his official capacity as treasurer of the company. In addition to this, he distinctly notified the defendant, at the time the account was opened and thereafter,

that he was acting as treasurer of the company, and would in nowise be individually responsible on any of the company's transactions, nor for any of its debts. This part of the plaintiff's testimony stands uncontradicted. The defendant, thereafter, could not pay out money on account of the company, and hold the plaintiff responsible therefor. Unless he intended to credit the company, he should have rejected their drafts when there were no funds in his hands to meet them. The mistake whereby the letter intended for Denver was directed to New York, in consequence of which the telegram expected from Denver was not received, was the mistake of the defendant, for which the plaintiff was in nowise responsible, and for the consequences of which he can not be held to answer. The court did not err in refusing to allow the overdraft on the account of the mining company as an offset against the individual claim of the plaintiff.

The judgment of the court below is affirmed.

1. One accepting individually a bill addressed to his firm becomes personally liable: *Owen v. Van Uster*, 10 Com. B. 318.

2. Note signed by superintendent—parol evidence allowed to show it the note of the company: *Bean v. Pioneer Co.*, 66 Cal. 451.

3. Where a corporation did business under the name of "M. Commercial Director," a note made payable to such director may be sued by the corporation: *Societe des Mines v. Mackintosh*, 18 Pac. 863.

LEGGATT ET AL., Respondents, v. STEWART ET AL.,
Appellants.

(5 Montana, 107. Supreme Court, 1883.)

Denial construed as admission under Montana Code. An answer filed six months after the complaint, and denying that the plaintiffs are in possession of the premises described, is an admission that they were in possession at the date of the commencement of the action.

Averment of title in defendant. An allegation in the answer of title in the defendant does not present a new issue. It may be proved under a general denial.

¹ **Lode claim 1,768 feet long held void.** Boundaries of mining claims must be definite and readily traced, and within the limit authorized by law; boundaries beyond the maximum limit import no notice, and are equivalent to no boundaries at all.

Appeal from Second District, Silver Bow County.

KNOWLES & FORBIS, for respondents.

THOS. L. NAPTON, for appellants.

WADE, C. J.

This is an action to quiet title. The plaintiffs allege in their complaint that they are the owners of and in the actual possession of the mining ground therein described. Nearly six months after the filing of the complaint the defendants filed their answer, and deny that said plaintiffs, or any of them, are the owners of or in the actual possession of the premises described in the plaintiffs' complaint, or any part or portion thereof. This denial is insufficient, for the reason that it does not deny that the plaintiffs were in the actual possession of the premises at the date of the commencement of the action. It is an admission that the plaintiffs were in actual possession when they filed their complaint.

The defendants allege, as new matter, the following: "Defendants aver the facts to be that at the commencement of plaintiffs' said action, and long prior thereto, these defendants were, and ever since have been, and now are, the owners of the

¹ See *Richmond Co. v. Rose*, 114 U. S. 576; *Hauswirth v. Butcher*, 4 Mont. 299.

premises described in plaintiffs' said complaint, and every part thereof, and in the possession of, and entitled to the possession of, the same." This is not new matter, for the reason that all the facts alleged therein might have been proved under a proper general denial. Says Justice RHODES in *Marshall v. Shafter*, 32 Cal. 177: "It is proper at this point, however, to say that it is settled beyond all controversy, in this State, that the defendant may, under the general denial, give in evidence title in himself, and it follows that the allegation of such title in the answer does not constitute new matter, and therefore the allegations of title in the defendant do not present a new issue." This language was adopted by this court in the case of *Meyendorff v. Frohner*, 3 Mont. 324. See, also, Pom. Rem. & Rem. Rights, §§ 624-633; Moak's Van Santv. Pl. 520, 813. Besides, those allegations of new matter are ambiguous and uncertain, for the reason that it is impossible to ascertain therefrom whether the pleader intends to aver that the defendants were in possession at the date of the commencement of the action or at the time of the filing of their answer. Hence, it follows that the instruction to the jury, that it was admitted in the pleadings that the plaintiffs were in possession of the premises at the commencement of the action, was correct.

The appellant claimed the ground in controversy by virtue of the Raven lode location, which was 1,763 feet in length by 596 feet in width. The extent of a lode location is limited by the statute to 1,500 feet in length and 600 feet in width. The court instructed the jury upon the point as follows: "The location must be so distinctly marked on the ground that the boundaries can be readily traced, and the court instructs you that a location 263 feet in length in excess of the ground allowed by law to be located is void for uncertainty, and defendants can not claim to have sufficiently marked their boundaries if their stakes include 1,763 feet in length." This instruction is entirely within the decision in the case of *Hauswirth v. Butcher*, 4 Mont. 299, where it is held that "the boundaries must be so definite and certain as that they can be readily traced, and they must be within the limits authorized by law, otherwise their purpose and object would be defeated. The area bounded by a location must be within the limits of

the grant. No one would be required to look outside of such limits for the boundaries of a location. Boundaries beyond the maximum extent of a location would not impart notice, and would be equivalent to no boundaries at all."

Judgment affirmed.

SKIDMORE V. EIKENBERRY.

(53 Iowa, 621. Supreme Court, 1880.)

¹ **Extent of obligation to search for coal.** Under a contract binding the defendant to pay a certain price for a tract of land in case he found a vein of good merchantable coal not less than four feet in thickness, in a shaft then being sunk by him on the land, it was held that it was his duty to make a reasonable effort to find coal of the character described, in view of the depth of the known veins in the vicinity, and by using the ordinary and usual methods and appliances, and that what constituted such reasonable effort was a question for the jury, under all the evidence.

Appeal from Lucas Circuit Court.

On the first day of September, 1876, the plaintiff sold to the defendant 78 acres of land, for which the defendant paid down the sum of \$1,500, and executed three written obligations for the payment of the further sum of \$1,561. These obligations are all alike except as to amount and time of payment. A copy of the one first maturing is as follows:

"CHARITON, September 1, 1876.

"In case I find good merchantable coal, not less than four feet in thickness, in shaft now being sunk on land this day bought of Mayberry Skidmore, I promise to pay Mayberry Skidmore two hundred and seventy-two dollars and eighteen cents, with ten per cent. interest from December 1, 1876, on April 1, 1877; if not so found this obligation to be void.

"DANIEL EIKENBERRY."

The other obligations are payable on the first day of December, 1877 and 1878, respectively. On the twentieth day of Au-

¹ *Ray v. Hodge*, 15 M. R. 371.

gust, 1879, this action was commenced for the recovery of the sums mentioned in these obligations. The petition alleges that if the defendant did not strike coal four feet in thickness in said shaft, it is owing to his negligence in not sinking the shaft to a sufficient depth. Prior to the introduction of any testimony the plaintiff dismissed his cause of action as to the obligations due December 1, 1877 and 1878. There was a jury trial, and a verdict and judgment for the defendant. The plaintiff appeals. The material facts are stated in the opinion.

MITCHELL & PENICK, for appellant.

STUART BROTHERS and THORPE & Sons for appellee.

DAY, J.

On the twenty-fourth of February, 1876, the defendant leased from the plaintiff 280 acres of land, including the 78 acres subsequently purchased, and commenced sinking thereon, near the south end of the purchased land, the shaft in controversy. This shaft was about 100 feet deep at the time of the purchase. At the time of the defendant's purchase the White Breast Coal & Mining Company had struck a four-foot vein of coal at the depth of 250 feet, in a shaft located about one half mile north and one half mile east of the defendant's shaft. The evidence shows that the veins of coal dip and rise, corresponding somewhat to the surface of the ground. The vein of the White Breast Coal & Mining Company dipped to the north and east.

It appears from the evidence that fire-clay underlies all veins of coal, and that "faults" sometimes occur in the vein, where the coal entirely disappears, but that the fire-clay is still found in such places. Boulders are frequently found in the coal, sometimes occupying more than the entire thickness of the vein. In driving an entry west of the White Breast shaft, a fault was struck running southwest, which the miners did not drive through. South and west of the White Breast shaft the coal was more rocky than north and east. The defendant sunk his shaft to the depth of 300 feet, and then drilled 37 feet more. At 52½ feet from the surface a seventeen-inch vein of coal was struck. The next vein was 14 inches thick,

74½ feet from the surface. Eighteen feet under that was an eighteen-inch vein. Next was found an inch vein of coal in slate, with no fire-clay under it. Six or eight feet under that was found four inches of coal. At 199 feet a scale of coal was struck. At 212 feet a sand rock was struck, which was 50 feet through. Near the bottom of the shaft an inch and a half of coal was struck.

Under all of these veins, except the one in the slate, fire-clay was found. No fire-clay was found at any place where coal was not found. The drill passed through eight inches of coal and then into a hard rock, resembling a boulder, four feet, when work was stopped. The defendant spent \$5,000 on the shaft, besides \$1,166 for an engine, and a further sum for an engine house. The evidence shows that a dip of 75 feet in three fourths of a mile would not be unusual. The surface of the ground at the defendant's shaft is about 10 or 15 feet higher than at the White Breast shaft. After the defendant quit work, the Lucas Coal & Mining Company sunk a shaft near the north end of the 80, nearly one half mile north of the defendant's shaft, and found a good four-foot vein of coal at the depth of 334 feet. The surface of the ground at the Lucas shaft is from 25 to 35 feet higher than at the White Breast shaft.

The important question involved, and the one decisive of all the errors discussed, is the proper construction of the written obligations. The plaintiff in various forms asked the court to instruct that it was the duty of the defendant, under the contract, to sink the shaft to the lowest depth at which it would be practical to operate a four-foot vein of merchantable coal, unless the evidence shows affirmatively that the defendant at such depth would not have found a four-foot vein of coal. The court refused all the instructions asked, and instructed the jury as follows:

"1. Under the contract in question in this case, if you find said note was given as part consideration for the purchase of the 80 acres on which said shaft was located, and that the defendant was engaged in sinking a shaft on said land at the time, under the lease in evidence in this case, then, under this contract, the defendant would be bound to make a reasonable effort to find coal of the character described in the contract,

and if he neglected so to do, then he would be liable under the contract for said money.

"2. But, under said contract, he would not be under an obligation to sink said shaft to an extraordinary depth, but he would only be required to sink it to the ordinary depth at which such coal was found, in view of the known depth of the coal veins at the time he was engaged in sinking such shaft, using the ordinary and usual means and appliances in so doing, and such expenditure of money in so doing as was usual, ordinary and reasonable, in view of the knowledge then existing of the coal veins in the country; and if you find that the defendant has so done, and a vein of coal of the depth and character not found, then the defendant is not liable. That is to say, unless the defendant actually reached with the shaft a vein of coal of the depth and character provided by the contract, he would not be liable unless he failed to make a reasonable effort so to do, as before defined.

"3. The defendant is not bound to experiment and see if coal could be found at a depth beyond which such coal could be reasonably expected to be found.

"4. In determining whether or not the defendant sunk the shaft to a reasonable depth, you should consider the depth of other shafts and coal of the character described by the contract, in the country, and the depth of the shaft sunk, the cost and expense of sinking the same, and the expenditure actually made in so doing, and the information and knowledge then existing with reference to the veins below the surface in this part of the country, and the difficulty and cost of operating said shaft.

"5. The fact that since the shaft has been abandoned coal has been found at another point on said land, can not be considered in determining whether or not defendant made a reasonable effort.

"6. Defendant was not necessarily bound to sink said shaft to the lowest depth that it would pay to operate a coal mine; he was simply required to sink said shaft to a reasonable depth, taking into consideration the depth at which such vein of coal has been found in other coal shafts in the same neighborhood at that time, and other facts as before stated."

The plaintiff excepted to all of these instructions, and as-

signs the giving of them as error. We think they place a proper construction upon the contract, and announce correct rules of law. The defendant might have been under obligation to sink the shaft to the lowest practicable depth, if he had been certain of finding the requisite vein of coal at that depth. But there is no rule of law which requires him to hazard his money to such an extent upon an uncertainty. All that the law requires is that he shall act in good faith, and exercise reasonable diligence and use reasonable exertions, in view of all the surrounding circumstances, to find the specified vein. The law can not define absolutely the depth to which the defendant should go, nor the efforts which he should exert. These are questions of fact for the jury, to be determined under the general direction that the exertions must be reasonable, in view of all the circumstances.

2. The plaintiff assigns as error the refusal of the court to give the following instruction:

"If, at the time defendant abandoned the further search for coal in said shaft, the geological indications were such as to show a coal miner of ordinary mining knowledge and experience to a reasonable certainty that the bottom of the drill hole was either in or near a four-foot vein of merchantable coal, then defendant should have prospected further, either by further sinking the drill hole he was then in, or by sinking another; or by some other test by which he could have ascertained as to the coal with a reasonable certainty; unless you find that such a vein of coal does not lie under said shaft, within a depth practical or profitable for working."

The facts mentioned in this instruction might very properly have been taken into consideration by the jury, in determining whether the defendant acted in good faith and prosecuted his work to a reasonable depth. But these facts do not justify the announcement of a rule of law that under such circumstances it was the duty of the defendant to prospect further. Experience shows that, as to the matter under consideration, geological indications are often deceptive, and the opinions of experienced miners unreliable. Even in the present case the testimony shows that some of the experienced miners employed by the defendant were of the opinion that the vein in the White Breast shaft had been passed long before the depth

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of 300 feet was reached, and they advised the defendant to resort to drilling long before he did so.

The view which we have taken as to the proper construction of the contract practically disposes of the case, and renders unnecessary a separate consideration of the errors discussed.

The judgment is affirmed.

OLIPHANT V. THE WOODBURN COAL AND MINING COMPANY.

(63 Iowa, 332. Supreme Court, 1884.)

¹ **Contract to seek for coal and when found, to pay.** Plaintiff counted upon defendant's written promise to pay money when it "should succeed in sinking a shaft on its leased lands and developing a paying vein of coal," the contract being silent as to when the company should sink the shaft or as to what efforts it should make to do so, except that it provided that the company should "use all reasonable efforts to sell stock to raise sufficient money to dig a shaft;" *Held*, that the company was not thereby bound to sink a shaft, regardless of the means at its command and of the prospect of striking a paying vein of coal; nor was it bound to sell its stock at less than par to raise the necessary funds to sink a shaft.

Contingency for payment prevented by defendant's fault. The plaintiff can not recover upon a contract for the payment of money upon the happening of a certain event until the happening of the event contracted for, unless he be able to show that the defendant acted in bad faith or an abuse of discretion with intent to defeat the happening of that event, and thus to defraud the plaintiff of his rights under the contract.

Sale of stock for less than par. *Held, arguendo*, that the officers of a corporation can not properly sell the corporate stock for less than its par value.

Special injury to particular stockholder. A holder of corporation stock can not maintain an action against the company for damages in the depreciation of his stock, resulting from mismanagement of the affairs of the company, unless he shows that the injury he has sustained to his stock is peculiar to himself, and does not fall equally upon the other stockholders.

Appeal from Clark Circuit Court.

The plaintiff avers that the defendant is a corporation incor-

¹ *Ray v. Hodge*, 15 M. R. 371.

porated under the laws of Iowa; that he is the owner of twenty-six shares of stock in the corporation; that the defendant has been guilty of bad management, by reason of which the stock has become depreciated in value, and he has thereby sustained damages. He also avers that he entered into a written contract with the defendant, whereby defendant was to pay him a certain sum of money; that the money called for by the contract has become payable, but remains unpaid. To aid himself in enforcing his alleged claims, he sued out an attachment and levied upon the defendant's property. The defendant, for answer, denied the alleged bad management, admitted the execution of the contract, but denied that anything had become due under the same. By way of counterclaim, it averred that the attachment was wrongfully sued out, and prayed judgment for damages. There was a trial to a jury, and verdict and judgment were rendered for the defendant for \$25. The plaintiff appeals.

JOHN CHANEY, B. H. MITCHELL, and TEMPLE & TALLMAN,
for appellant.

STUART BROS., for appellee.

ADAMS, J.

The proper consideration of the questions presented requires a more detailed statement of the facts out of which the controversy has grown. The defendant is a corporation organized for the purpose of mining for coal. In April, 1880, the defendant having taken a lease of certain land in Clarke county, supposed to contain coal, entered into a written contract with the plaintiff whereby it employed him to drill a prospect hole at a certain place, and at a certain agreed price per foot. The work was to be prosecuted until coal should be discovered or the plaintiff should be stopped by the company. Under the contract the plaintiff drilled to the depth of about 420 feet, but did not discover coal. Whether he was stopped by the company or not the parties do not appear to have been agreed. There was evidence that the plaintiff reported to the company that he had got a piece of iron—a

knuckle—in the drill-hole, and could go no further. The plaintiff had not been paid the full contract price, and there appears to have been a disagreement as to the amount to which he was entitled under the circumstances. He avers in his petition that “there was some trouble or difference in regard to a settlement.” It appears, however, that a settlement was finally reached. The company paid the plaintiff \$50 in money, gave him twenty-six shares of stock in the company, and the balance of his claim, stated to be \$308, was to be paid in money when the company should succeed in sinking a shaft on their leased lands, and in finding and developing a paying vein of coal. This settlement was reduced to writing, and the writing constitutes the contract sued upon. It is not averred by the plaintiff that the company has succeeded in finding and developing a paying vein of coal, but it is averred that the company has failed and refused to sink a shaft; that the failure to sink a shaft has caused the stock to depreciate in value; and that by reason of the failure the sum of \$308, provided for in the contract, has become payable.

In regard to the operations of the company, we may say that it appears that it commenced at one time to sink a shaft, but abandoned or suspended the work because it estimated that it would cost from \$15,000 to \$20,000 to sink a shaft, and it had not the means to do it, and judged that it would not be able to obtain the requisite means without some evidence of the existence of coal; that for the purpose of obtaining such evidence it proceeded to drill another prospect hole, and was engaged in drilling it, when this action was brought. The contract was executed in March, 1881, and the action was brought after the lapse of about fourteen months.

1. We will proceed, first, to inquire relative to the rule of law applicable to the maturity of the plaintiff's claim under the contract. We have seen that it was made payable upon the finding and developing of a paying vein of coal, and that no coal has been found. The plaintiff contends, however, that an implied obligation arose on the part of the defendant to make reasonable efforts, in view of all the circumstances, and that, if the company had not made such efforts, the claim had become payable, and that it was his right to have the question submitted to the jury as to whether the company

had made such efforts. In accordance with this view, he asked an instruction in these words: "If you find that the defendant did not, within a reasonable time after the execution of the contract, make reasonable efforts to fulfill the terms thereof, this would constitute a breach of said contract on the part of the defendant, and the plaintiff would be entitled to recover the amount which would become due upon the completion of the contract, if the same had been fully completed." The court refused to so instruct, and gave an instruction as follows: "Before the plaintiff can recover, he must show that the defendant acted in bad faith with him, with intent to defeat his realization of future compensation under the contract, or that, in its acts, it committed such abuse of a fair and reasonable discretion in the performance of its duties, assumed in view of its contract, that it did produce the result complained of; and further, that, in the exercise of a fair and reasonable discretion, the plaintiff would have realized the compensation agreed upon under the contract." The ruling of the court in refusing the instruction first set out, and in giving the second, is assigned as error.

The plaintiff's complaint is that the company had not, at the end of fourteen months from the time it entered into a contract with him, sunk a shaft to any great depth, and was still merely prospecting by drilling prospect holes; that, under the contract, the company was bound to sink a shaft within a reasonable time, or make reasonable efforts to do so, and that it was the plaintiff's right to have the question submitted to the jury as to whether, under the evidence, the company has discharged its obligations to the plaintiff in this respect. It is not contended by the plaintiff that the obligation can be found expressed in the contract. A copy of the contract is attached to the plaintiff's petition, but we do not deem it necessary to set it out. It is sufficient for our purpose to say that the contract is silent as to when the company would sink a shaft, or what effort it would make, or whether it would make any at all, except that it is provided that the company will "use all reasonable efforts to sell stock to raise sufficient money to dig a shaft." As to the implied obligation upon which the plaintiff relies we have to say that, if there was any, we do not think that the company, if it had sufficient money, was bound

to sink a shaft regardless of expense, and in the absence of any prospect of coal. Whether the managing officers could have bound the company to do so, we need not inquire. We do not think that any such promise was raised by mere implication of law. Nor do we think that there was an implied promise to use what might seem to others to be reasonable efforts.

If the stock had not all been issued it was in the regular course of business for the officers to procure subscriptions to what remained, or, to use the language of the contract, to sell it. The officers might properly enough bind themselves to use reasonable efforts to do this. But the raising of money by sale of stock would not of itself have caused the plaintiff's claim to mature. The officers still had a discretion to be exercised in view of the circumstances as they should appear from day to day. It may be conceded that there was an implied obligation to act in good faith toward the plaintiff, or, what is nearly the same thing, not to abuse their discretion. But they did not, we think, undertake to contract away their discretion. They had been elected for the express purpose of exercising it. Their experience, knowledge, judgment and skill had been contracted for by the company, and we will not presume from anything which we find in the contract that they intended to subordinate their judgment to what they might suppose would be that of a jury. If, then, they did not contract away their discretion, it became, at most, as the court held, a question of the want of good faith or abuse of discretion. It is true the court went a little further, and held that the plaintiff, in order to recover, should also show that his claim would have become payable if a fair and reasonable discretion had been exercised in the work. Possibly, if the plaintiff had shown a want of good faith or abuse of discretion, his claim should be deemed to have become payable without any further showing. But it is not material to determine this. We hold that the plaintiff could not recover without showing a want of good faith or abuse of discretion, and we are unable to find the slightest evidence of either. The company did not sell out so as to put it out of its power to discover coal, nor did it refuse to proceed after having discovered it. It retained its lease and pursued its work of pros-

pecting, preparatory to determining where and when to sink a shaft. It might perhaps have prospected more thoroughly by sinking a shaft instead of drilling. But it could not do this without the means; and the evidence not only fails entirely to show that it had the means, but tends to show affirmatively otherwise.

It is insisted by the plaintiff in argument that the company might have sold stock, and was bound by its contract to make reasonable efforts to do so, and that it failed to make such efforts. The evidence shows a slight effort on the part of the company to sell stock. Whether that was a reasonable effort must depend upon other evidence. The company was not bound to make a vain effort, and there is no evidence that a share of stock could have been sold at par. We infer, indeed, that it could not. The evidence shows that it was worth \$10 per share. If the shares were of the usual size, \$100 each, the stock could have been sold at only ten cents on a dollar of its par value. The officers could not properly sell for less than the par value. In Green's Brice's *Ultra Vires*, 143, notes, it is said: "The sale of stock in a corporation by the directors at a less rate than the price fixed in the charter is a fraud upon the law and the stockholders," citing *Sturges v. Stetson*, 1 Biss. 246; *Fosdick v. Sturges*, Id. 255; *Mann v. Cooke*, 20 Conn. 188; *Fisk v. Chicago, R. I. & P. R. Co.*, 53 Barb. 518; *O'Brien v. Same*, Id. 568; *Neuse River Nav. Co. v. Com'rs*, 7 Jones, Law, 275. See, also, *Osgood v. King*, 42 Iowa, 478.

While the instruction refused is very general in its terms, and perhaps not objectionable as an abstract proposition, there was nothing in the evidence, we think, that would have made it proper to give it. On the other hand, the instruction given was, we think, in the main correct, and if there was any error it was, we think, under the evidence, without prejudice.

2. Upon the question as to the alleged depreciation of stock by the defendant's mismanagement, the court instructed the jury that, to enable the plaintiff to recover, "he must show that the injury which he has sustained to his stock was peculiar to him alone, and did not fall alike upon other stockholders and himself." The giving of this instruction is assigned as error. An incorporated company is composed of

the stockholders. It would be useless to allow each to recover a judgment against the company for damages sustained for the depreciation of stock. The plaintiff contends, however, that while the injury sustained by depreciation of stock was not peculiar to him, he alone should be allowed to recover, because he alone stipulated for the sinking of a shaft, and the failure to sink the shaft was the mismanagement which caused the depreciation. Whether the officers of a company can stipulate with a stockholder for a certain line of policy, so as to render the company liable for damages if such line of policy is not followed, we need not determine. There are several insuperable objections to the plaintiff's position. The contract in question did not bind the company to sink a shaft. The most that can be said is that it bound the company not to act in bad faith toward the plaintiff nor abuse its discretion, and we have found that there was no evidence that it did either. Besides, the evidence did not show, nor was there any evidence tending to show, that the sinking of the shaft would have resulted in the discovery of coal; and if it had not, the company might have been in a far worse condition than it is now. It is true there is evidence that the stock is worthless, but it might be much worse than worthless if it was not fully paid and the company had incurred indebtedness.

Many other errors are assigned, but the views which we have expressed dispose of the case, and the judgment must be affirmed.

RAY ET AL., Respondents, v. HODGE, Appellant.

(15 Oregon, 20. Supreme Court, 1887.)

Suit for unprobated claim. An action may be maintained against the estate of a decedent without previous presentation to the county court for allowance.

¹ **Consideration payable out of mine.** A agreed to and did assign to B a half interest in a lease of a gold and quicksilver mine, for "\$750 cash, and \$1,250 when 250 flasks of quicksilver should be produced." *Held*, that, in the absence of a showing that 250 flasks had been produced, A could not recover from B the amount stipulated, without proving that

¹ *Linn v. Butler*, 8 Colo. 355; *Worden v. Dodge*, 2 M. R. 116; *Anspach v. Best*, 12 M. R. 110.

B had failed to make reasonable efforts to operate the mine in view of the outlay attending it and the prospects in its development.

¹ **Obligation in such case to work the claim.** On sale of an interest in a mining lease reserving the principal part of the purchase price out of the proceeds (quicksilver): *Held*, that the contract implied a working of the mine in connection with the co-lessees, but did not compel work by the vendees in case the co-lessees refused; nor an absolute covenant to produce that amount; nor a covenant to work after reasonable experiment had showed profitable working improbable.

Appeal from the judgment of the Circuit Court for the County of Multnomah. Reversed.

The appellant demurred to the complaint upon the ground that the claim upon which the action was founded had not been presented to the county court for allowance, after it had been disallowed by the executrix, before this action was brought.

The overruling of this demurrer was one ground insisted on by the appellant.

The other facts are stated in the opinion.

GEARIN & GILBERT, for appellant.

Hodge was not bound to go on with the work after W. and N., his co-lessees, had abandoned it; nor was he bound to manufacture 250 flasks of quicksilver at a loss; that was not contemplated or provided for in the lease: *Skidmore v. Eikenberry*, 53 Iowa, 621; *Berger v. Peterson*, 78 Ill. 633; *Lorillard v. Silver*, 36 N. Y. 578; *Pinch v. Anthony*, 10 Allen, 470; *Reed v. Golden*, 26 Kan. 500; *Oliphant v. Woodburn C. & M. Co.*, 63 Iowa, 332.

W. R. WILLIS, C. BALL, and WATSON, HUME & WATSON, for respondents.

When appellant abandoned the mine, when, by carrying on the work in the stipulated manner 250 flasks of quicksilver could have been produced, the unpaid purchase price became due. The cost of the work is immaterial: 2 Chitty on Contracts, 1067; *Lamoreaux v. Rolfe*, 36 N. H. 33; *Miller v.*

¹ *Skidmore v. Eikenberry*, 15 M. R. 360; *Oliphant v. Woodburn Co.*, Id. 365.

Whittier, 32 Me. 203; *Newcomb v. Brackett*, 16 Mass. 161; *Thurs'on v. Franklin College*, 16 Pa. St. 154.

THAYER, J.

The respondents commenced an action in said circuit court to recover the sum of \$2,500, which they alleged to be due from the appellant, as executrix of the estate of Charles Hodge, deceased, and which allegation was controverted by the appellant. The case was tried before the circuit court, without a jury, and judgment given in favor of the respondents for said sum. The only questions in the case that need be considered are the rights and liabilities of the parties under an agreement of assignment of a half interest in a lease, made by the respondents to said Charles Hodge in his lifetime, and the sufficiency of the findings of the circuit court to sustain the judgment given thereon. Some other questions were raised by the appellant's counsel, but the court regards them as untenable. The agreement of assignment is as follows:

"Mem. of agreement made between Reuben Doty and J. H. Ray, of the first part, and Charles Hodge of the second part, witnesseth, that the parties of the first part, in consideration of one dollar U. S. gold coin to them paid, and for the considerations hereinafter mentioned, have agreed and do hereby agree to transfer, assign, and make over unto the party of the second part one half interest in a certain lease and agreement made between the Bonanza Gold & Quicksilver Mining Co. and John Winterburn and Imes J. Napier, dated October 1, 1881. The consideration noted in the margin to be paid by the said second party to the said first parties.

"Dated at Calipooia, Douglas Co., Or., this twenty-ninth day of September, 1881.

"J. H. RAY.

"REUBEN DOTY.

"CHAS. HODGE,

"By JOHN WINTERBURN.

"[Note in margin.] \$750 cash, \$1,250 when 250 flasks of quicksilver produced, to each of the first parties."

There is no claim but that the respondents carried out their part of the agreement, by causing an assignment to be made

of the one half interest in the said lease. The transfer to Hodge, however, was made upon the express condition that the engineering and management of all the operations at the mine should be and remain in the hands of the original lessees, Winterburn and Napier. The lease referred to in the agreement of assignment was a five years lease of the mine. It required the lessees to keep two men constantly employed, and provided for the forfeiture of the lease (at the option of the company) on failure of the lessees to do so. The lessees were to pay the company as rent one tenth of the gross product of the mine; and it was further provided in the lease that whenever, in the judgment of the lessees therein named, 500 tons of ore, of a sufficient value to justify reduction, should be extracted from the mine, that they should have the same reduced at the works of the New Idrin Mining Company, or immediately begin work for the construction of a furnace for that purpose. The agreement between the respondents and Hodge imposed no express obligation upon the latter to work the mine, though I think it fairly inferable therefrom that it was understood between the parties to it that he would, in connection with the said Winterburn and Napier, work it, and that the terms of the lease would be observed. Hodge agreed to make the deferred payment to the respondents when 250 flasks of quicksilver had been produced; and if he or his representative refused to go on with the work when there was a reasonable probability that the mine, if worked in the ordinary mode and process in which such affairs are carried on, would have produced quicksilver in such quantities as to justify its development, said payment would have matured. It may also be inferred from the transaction that the parties understood at the time that the mine would, if worked with reasonable diligence and care, produce an amount of quicksilver that would justify the outlay. But the court is unable to agree with the respondents' counsel that Hodge obligated himself, by taking the assignment of the half interest in the lease, to extract from the mine 250 flasks of quicksilver. He did not agree to prosecute the work longer than it could successfully be operated. The tacit understanding that the mine would prove a success was a part of the implied understanding that he would work it. The undertaking was evidently an experiment.

Hodge was willing to pay the respondents \$1,500 cash, and \$2,500 more when the 250 flasks of quicksilver were produced; but he did not agree expressly or by implication that he would produce that quantity of quicksilver, or prosecute the enterprise any longer than a prudent man would be justified in continuing it. If the mine proved a failure, what object would there be in keeping the two men employed upon it during the entire term of the lease? There is no covenant that he should do that, nor any obligation to do it, if its development failed to meet the reasonable expectation of the parties. The stopping the work did not give the respondents any right to claim the \$2,500 payment, unless it was an unjustifiable quitting, as viewed from a prudent business standpoint.

The issue between the parties was simply this: The respondents said that the deferred payment was due, not because the required amount of quicksilver had been produced which matured it by the terms of the agreement, but for the reason that the appellant had neglected a duty, which she, as executrix of Charles Hodge, owed to them in regard to the prosecution of the mining enterprise. That was the issue that the circuit court was called upon to determine. We have already indicated what duty Charles Hodge was under to the respondents. Their counsel claim that the appellant abandoned the work in May, 1883, and that, if she had properly conducted it, she could and would have produced 250 flasks of quicksilver prior to that time. The court found against the respondents upon this allegation: Found "that the mine could not be operated at a profit, nor could it, by any reasonable outlay of money and labor, have produced 250 flasks of quicksilver by the thirteenth day of May, 1883." The court did, however, find "that 250 flasks of quicksilver could have been taken out of said mine within the term of said lease, had the same been worked and operated in the manner provided in said lease." I do not see that this last finding aids the respondents' case in the least. The appellant could only operate the mine in conjunction with Winterburn and Napier. They owned the same interest in the lease she did, and had charge of the engineering and management of the work, and she alleges in her answer that the mine could not be worked to any profit, and was abandoned after it had been proven by the lessees that the ore did not

pay the cost of reducing it. No valid judgment could be rendered in the action, without a finding that the appellant failed to make reasonable efforts to operate the mine, in view of the outlay attending it and the prospects obtained in its development. To require the appellant to impoverish the estate of which she was the representative, in order to extract 250 flasks of quicksilver, would be absurd. There was no implied promise arising out of the transaction to that effect. The following authorities sustain this view: *Toombs v. Consolidated Poe Mining Co.*, 15 Nev. 444; *Reed v. Golden*, 26 Kan. 500; *Pinch v. Anthony*, 10 Allen, 470; *Skidmore v. Eikenberry*, 53 Iowa, 621; *Berger v. Peterson*, 78 Ill. 633; *Oliphant v. Woodburn Coal Co.*, 63 Iowa, 332. This last case was an action upon a written contract to pay money when the defendant should succeed in sinking a shaft on its leased lands and develop a paying vein of coal. The plaintiff relied, as in the case at bar, upon an implied obligation to sink the shaft. The court said (page 336): "As to the implied obligation upon which the plaintiff relies, we have to say that, if there was any, we do not think that the company, if it had sufficient money, was bound to sink a shaft, regardless of expense, and in the absence of any prospect of coal. * * * We do not think that any such promise was raised by mere implication of law; nor do we think that there was an implied promise to use what might seem to others to be reasonable efforts."

In *Lorillard v. Silver*, 36 N. Y. 577, in an action upon a written promise to pay the plaintiff \$500 in consideration of land the defendant had purchased from him, over and above the amount he had agreed to pay him therefor, in case he realized \$3,500 for it, or any other sum between \$3,000 and \$3,500 that he might sell it for, it was held by the court of appeals, although it appeared in evidence that the defendant purchased the land upon speculation for the purpose of selling again, that the defendant was not bound to sell the land, although he received an offer of \$1,500 for it. HUNT, J., in delivering the opinion of the court, said (page 580): "The exclusive right to dispose of the property was left with the defendant; and it was a necessary result, that he was justified in acting with reference to his own interest in accepting or

rejecting an offer for the property. I think it was in contemplation of the parties that the defendant was to act upon this principle, and that if it should result, while so acting, that a certain rate of profit should be made, then the plaintiff's right should attach to the additional \$500. His rights were subordinate to, and dependent upon, the result of the defendant's disposition of the property."

This authority goes further than I am inclined to hold in this case; though it is difficult to discover any material difference in principle between the two cases. To hold that there must be a finding that the appellant neglected to operate the mine when it could have been worked consistently with her interest, before a recovery against her can be had, is within the general line of the authorities and the rules of common sense; and as there is no such finding, and the evidence contained in the bill of exceptions will not justify any such finding, the judgment appealed from must be reversed, and the case remanded to the circuit court, with directions to enter a judgment upon the findings in favor of the appellant.

A petition for rehearing in this case was denied by the court April 19, 1887.

1. Enforcement of contract for consolidating claims in corporation: *Reich v. Rebellion Co.*, 2 Pac. 703.

2. Force of contract between individuals for benefit of corporation; liability of persons and company considered: *Craig v. Fry*, 68 Cal. 363.

3. A was to work and turn over proceeds to B. B was to pay the workmen and apply balance on his debt from A to B: *Held*, not a contract between B and the workmen: *Chung Kee v. Davidson*, 15 Pac. 100.

4. Creditor placed in charge of mine to pay his debt; his relation to the costs of working considered: *Davis v. Patrick*, 122 U. S. 138.

KETCHUM V. BARBER.

(12 Pacific Rep. 251. Supreme Court of California, 1886.)

¹A deed to Henry Stull & Co. vests the legal title in Henry Stull, and his deed will carry good title to the grantee.

Implied admission of ouster. Admission of a deed to plaintiff, followed by an allegation of abandonment by plaintiff and re-entry by defendant, is an admission of the ouster.

Appeal from Superior Court, County of Amador.

Ejectment for possession of a certain mining and water ditch running across defendant's lands. Plaintiff claimed title through one Henry Stull, who in turn derived, or claimed to derive, title from defendant by virtue of a deed made to Henry Stull & Co. Defendant in his answer admitted having given to Stull & Co. a right to dig and maintain the ditch, but claimed that it had been abandoned, and admitted that hence he had re-entered upon and used the ditch continuously to the time of trial. On the trial plaintiff, to make out his title, introduced the deed to Stull & Co. in evidence, and also put in evidence the deed from Stull to himself, and proved by witnesses the possession thereunder of himself and Stull, and closed. Defendant moved for a nonsuit on the ground that plaintiff had neither proven title nor possession in himself, nor ouster by defendant. The nonsuit was granted and plaintiff appealed.

EAGON & ARMSTRONG, for plaintiff and appellant.

McGEE & FARNSWORTH, for defendant and respondent.

BY THE COURT.

The nonsuit was improperly granted. The deed to Henry Stull & Co. vested the title in Henry Stull: *Winter v. Stock*, 29 Cal. 411, 412. The answer shows a sufficient ouster.

Judgment reversed, and cause remanded for a new trial.

¹ *Sherry v. Gilmore*, 58 Wis. 324.

1. Where land is conveyed to an association, the court may inquire as to what parties compose the association: *Pratt v. California M. Co.*, 24 Fed. 869.
2. Presumption arising from face of deed may be explained away; tenants in common may be shown to take unequal parts: *Id.*
3. Conveyance of all grantor's property "in the State" is good, and the property may be identified by parol: *Brown v. Warren*, 16 Nev. 228.
4. "Good and perfect" deed defined: *Feemster v. May*, 13 S. & M. 275; 53 Am. Dec. 83.

**JEREMIAH B. DURHAM v. THE CARBON COAL AND
MINING Co.**

(22 Kansas, 232. Supreme Court, 1879.)

Questions of fact when open on appeal. Where a cause comes before the court of review wholly in the shape of depositions or documentary evidence, the facts are open to examination in the same attitude as they were before the trial.

Testimony given by a party or his agent against his interest is the equivalent of his admissions.

The testimony of interested agents of a corporation against its interest partakes of the nature of personal admissions against the corporation.

¹**The corporate seal** is no longer essential to constitute a corporate contract.

²**A corporation can not contract**, experiment with the subject-matter of the contract, and then successfully defend for the want of a formal execution of the contract.

Proof of a corporation entering upon land, prospecting the same, making partial payments under an executory contract known to all its agents without disaffirmance, may amount to proof of the contract without express evidence of formal execution or ratification.

P., a principal stockholder of the defendant corporation, after consultation with the president, entered into a written contract with plaintiff for the purchase of certain lands. It was signed with the corporate name "by ———, President, by P." It called for a cash installment, which was paid by P., who was after reimbursed by the board; the defendant took possession and sank several prospect wells for coal; not finding the vein of coal as thick as expected it declined to make the further payments: *Held*, that whether or not P. had authority to bind the corporation by signing the contract, it had accepted such contract and was liable for the purchase money.

Error from Shawnee District Court.

JOHN W. DAY and A. L. WILLIAMS, for plaintiff in error.

JOHN MARTIN and C. M. FOSTER, for defendant in error.

The opinion of the court was delivered by BREWER, J.

This was an action to recover money claimed to be due on a contract for the sale of land. That a contract was entered

¹ Wafer may stand for corporate seal: *St. Phillip's Church v. Zion Church*, 23 S. C. 297.

² *Watts' App.*, 8 M. R. 223; *East Jersey Co. v. Wright*, 9 M. R. 332.

into is undisputed; but the defendant denies that it was its contract—that it ever authorized such a contract in the first instance, or ratified it after it was made. The contract, which was in writing, purported to sell a certain quarter section of land to defendant for \$7,500 to be paid as follows: \$500 cash, \$500 in sixty days, \$1,500 in six months, \$2,500 in eighteen and \$2,500 in thirty months from date. By the terms of the contract the possession of said premises was given to the defendant; but in consideration that the defendant should not be required to pay interest on the deferred payments, defendant agreed that one LeRoy D. Stone, the tenant (and son-in-law) of the plaintiff, should continue to occupy, for farming purposes only, so much of said premises as he then cultivated, until March 1, 1877, the defendant “reserving to itself at all times the right to enter said land for the purpose of mining the same.” The parties to said contract were named therein as Jeremiah B. Durham on the one part, and the Carbon Coal and Mining Company on the other part, and the contract closed and was signed in the following form, to wit:

“In witness whereof the said parties to these presents have hereunto set their hands and seals. Dated the day and year first above written.

J. B. DURHAM, [Seal.]
CARBON COAL AND MINING COMPANY,
By D. F. BLANDIN, President,
By T. J. PETER.”

This contract was acknowledged before H. C. Williams, a notary public of Shawnee county.

The contention of the defendant is, that the president could not bind the company by a contract of purchase; that if he could, he could not delegate the power to a third party; and that the company never ratified this unauthorized contract.

The case was tried by the court without a jury. No findings of fact or conclusions of law were asked for or made. There was a general finding and judgment in favor of the defendant. The whole evidence is preserved and the question is whether, upon such evidence, the plaintiff was entitled to a judgment. We need only advert to the oft-repeated ruling of this court, that all presumptions are in favor of the judgment, and that all doubtful questions of fact are solved by the decision of the trial court. So that the question is not whether,

upon the testimony, a jury might be warranted in a verdict for the plaintiff, but whether such testimony compels a decision in his favor. In this case the defendant offered no testimony. It rested its case upon the evidence offered by the plaintiff. A part of this evidence was in deposition or other writing, and a part was the oral testimony of defendant's officers. If a case rested wholly in written evidence, whether document or deposition, it would come before us for examination in about the same attitude as before the trial court, and questions of fact might be fully and correctly examined and determined by this court. And where testimony is drawn from the lips of a party or his agents, no wrong will ordinarily be done such party if the testimony so given be accepted as true. A party's admissions are good against him; so is his testimony. And where a party like the defendant here acts only through agents, the testimony of those agents while still in its employ, as to acts done by them as agents, especially when they are largely interested as owners or stockholders, partakes something of the nature of personal admission or testimony. And further, when upon the record there appears no conflicting testimony, and it is apparent that it was accepted as true by the trial court, this court may properly act upon the same understanding, and inquire whether the law was, by the judgment, correctly applied to the facts: *Rumsey v. Schmitz*, 14 Kas. 547. In this case there is very little conflicting testimony. Much of it is in deposition or other writing, and most of it comes from the lips of defendant's agents and employes. Evidently about the facts there was little doubt or dispute, and the real question was, and is, whether upon those facts the plaintiff was entitled to recover.

Conceding that the mere execution of this instrument did not make a binding contract through want of authority in Peter to bind the defendant, still, we think upon all the facts the court should have found that the defendant was liable. The agreement was one which the defendant could unquestionably have enforced against the plaintiff. Even though made on the part of the defendant by an entire stranger, the defendant could at once have accepted the benefit of the contract, and the plaintiff could not then have pleaded the original want of authority in the stranger; and any conduct which, as

against an individual, would establish acceptance, will also as against the corporation. The old idea that a corporation would be bound only by a contract under seal, has long since been done away with. The vast amount of business now being transacted by such organizations, has compelled the application of more liberal rules. And now no corporation any more than an individual can experiment with a contract, take possession of the property contracted for, test its value, and then repudiate on the ground that no separate agent acting in the premises had full power to bind the corporation by the purchase.

In Green's Brice's *Ultra Vires*, 463, will be found the following language:

"It must also be remembered that the tendency of modern judicial interpretation and legislation has been to waive needless formalities, and that consequently at the present many agreements are held binding on corporate bodies, even without ratification, which, a few years since, would, from technical reasons, not have been so."

And on page 379 is this:

"Within certain limits, it would also seem that corporations by acting upon, without expressly 'ratifying' a contract—not necessarily relating to a subject essential to their existence—which does not bind them for want of sealing, may so far adopt it as to render themselves liable to an action either for use and enjoyment or upon the common counts, the nature and extent of their liability being estimated by a reference to the terms of the invalid agreement. It may, perhaps, be considered that the corporation has thereby actually ratified the agreement in question, but it would probably be the simpler and more reasonable explanation to say that the corporation by so acting is estopped from subsequently repudiating and denying the transaction."

Now, it appears in this case that Peter was largely interested as a stockholder in the defendant corporation; that he had been instrumental in securing other lands for the defendant; that Blandin was president and a director (the board of directors consisting of five members, two of whom were non-residents of the State, and seldom present); that Peter and Blandin consulted together and decided that it was advisable

for the corporation to purchase this land and in pursuance thereof Peter sought the plaintiff and persuaded him to enter into the contract; that the negotiations therefor were had in the office of the defendant; that the contract was made in the name of the defendant, and was executed by one assuming to have authority to bind the defendant; that the sum of \$500, the cash payment, was at the time made by Peter, by giving his individual check, and that this sum thus advanced was returned to him by the check of the treasurer, also a director, under instructions from the president, and the amount allowed by the board in their settlement with the treasurer; that the defendant took possession of the land, and sent employes thereon to prospect for coal, sinking several prospect holes therefor; that the vein not proving as thick as was expected, about a month thereafter Peter sent to plaintiff an open letter, by the hands of the president, in which he, admitting the purchase, states that it was made on account of representations as to the coal which had proved untrue, and that therefore the land was not wanted, and urges an arrangement of the matter in a Christian spirit; that after the sending of this letter the company continued for a short time its work on the farm, and that there never has been any express disaffirmance, by the directors, of this purchase. It also appears that at the next annual meeting after this controversy, the by-laws of the corporation were amended by adding this provision: "And all purchases and leases of real estate by the officers of this company shall be approved by the board of directors before the same shall be binding upon this company;" and thereupon the board proceeded to formally approve several contracts made by Peter and assigned to the company, and some by whom made does not appear.

In the light of these facts can it be doubted that the corporation accepted this contract? We think not. Take the matter of payment: A contract is made in which it is named as a party purchasing a certain tract of land; it is made by its principal stockholder upon consultation with its chief executive officer. Upon the face of the paper it is entitled to the deed, and is obligated for the price. In the absence of the officers, the stockholder advances the first payment of \$500. The president directs the treasurer to refund this money and the treas-

urer does so. Both the president and treasurer are directors, and the two are a majority of the resident directors. The treasurer reports his action to the board, and his action is approved. What is approved?—a donation of \$500 of corporate money, or a first payment on the contract? Can directors give away corporate funds? Would not that be a clear violation of official duty? Otherwise than as a first payment on and acceptance of the contract, this appropriation of \$500 to Peter was as clear a wrong upon the corporation as an embezzlement of like amount by the treasurer or other officer. No such imputation of wrong should be made. Again, the appropriation did not purport to be a donation. The president did not direct the treasurer to make a donation to Peter, neither did the treasurer intend a donation. Each knew that Peter had advanced money for the corporation, and each intended a reimbursement of that money. In so reimbursing they ratified the act and the whole act, and when the board approved, they approved it as a whole. This act of the board was either a gross perversion and misappropriation of corporate funds, or a recognition of the act of Peter as an act of the corporation. It will not do to say that the corporation may accept in part and reject in part. Like any other principal it accepts or rejects *in toto*. Neither was there anything to indicate an attempt to accept a part and reject the rest. The appropriation was not accompanied by any disaffirmance of the act. It may be conceded that a corporation, like an individual, may compensate a third party for losses in doing an unauthorized act, without assuming responsibility for the act. It was within the power of the corporation to pay Peter \$500 without ratifying the contract or assuming the liability which he had attempted to incur for it. But it must do something to evince such an intention—it must show that it repudiates his act while it compensates him for his loss. If it simply return to him the money he has assumed to advance for it, it implies an assumption of the act. Here the return was made without any limitation or qualification, and evidently the first thought was to avoid the contract, not on the ground that it was not the contract of the corporation, but on the ground of the misrepresentations of the vendor.

Again, take the matter of possession. Delivery of possession.

sion has been said to be sufficient part performance to take a parol contract for the sale of lands out of the Statute of Frauds: *Edwards v. Fry*, 9 Kas. 423. And this is upon the ground that the entry into possession is, unless supported by the contract, a trespass subjecting the party entering to an action for damages. In like manner the entry into possession and sinking of prospect-holes is consistent only with an acceptance of the contract. In any other light it was a flagrant trespass. It implied an intent to commit a gross invasion upon the rights of Durham; an invasion which, unless withstood, might ripen into a title by the mere lapse of time. It either entered under the contract or committed a trespass. The inference from the act is, that it intended the former rather than the latter. Just as, when a lease is prepared and signed by the lessor, if the lessee with full knowledge thereupon enters and takes possession of the premises, the law implies an acceptance of the lease, and that he is bound by its terms; and the burden is on him to show the contrary, and that he entered in defiance of the lease and in disregard of the lessor's rights. Taking possession is *prima facie* an acceptance of any right to enter which is shown to exist, and when a party may rightfully enter and does enter, the implication will be that the entry was rightful and not wrongful. In the case of *London Ry. v. Winter*, 1 Cr. & Ph., 57, the entering into possession of land and constructing a railroad over it was adjudged an acceptance of a contract for its purchase and avoided the necessity of any inquiry into the power of the agent to make it. In *Shaver v. Bear River Co.*, 10 Cal. 396, the manager of a mining company purchased in the name of the corporation a house to be used as an office for the corporation and a boarding house for its laborers. He took possession and subsequently several meetings of the trustees were held in the house. At one of these meetings a resolution was offered and rejected, declaring the contract legal and binding. No other vote or action of the trustees was shown. In a suit for the balance of the purchase money, it was held that if the authority of the manager to make the purchase were doubtful, the acts stated amounted to a ratification. The court remarked that "the entry of the resolution was a very singular mode of repudiating a contract. It would have been more in accordance with

correct notions of propriety and justice if a resolution refusing to accept a contract had been passed, accompanied by an offer to cancel the deed, which had not been recorded, and return the property of which they were in possession." See also *Moss v. Averell*, 10 N. Y. 449; *Church v. Sterling*, 16 Conn. 388; *Chicago Soc. v. Crowell*, 65 Ill. 453; *Wilson v. W. H. Ry. Co.*, 2 De G., J. & S. 475; *Crook v. Corporation of Seaford*, L. R. 6 Ch. 551.

Again, take the failure to disaffirm the contract. It was made in the name of the corporation, and knowledge of its terms was possessed by a majority of the resident directors, yet there is no disaffirmance of the act of Peter. Indeed, the only thing attempted was rescission, and not disaffirmance; and rescission implies an existing contract to be rescinded. It is the duty of a principal when aware that one is assuming as agent to contract in his behalf, to deny the power and disown the act, and a failure to do this will often work an affirmation of the power and a ratification of the act. In *Kelsey v. National Bank*, 69 Pa. St. 426, upon a robbery of the bank, the cashier, with the concurrence of a majority of the directors, offered a reward. The majority of the directors resided in the city, became aware of what had been done, and took no steps to disavow the act, and it was held that the bank was liable: *Reuter v. Electric Tel. Co.*, 6 El. & Bl. 341; *Bredin v. Dubarry*, 14 S. & R. 30; *Gordon v. Preston*, 1 Watts, 387; *Browning v. G. C. M. Co.*, 5 H. & N. 856.

We might extend this opinion, noticing other matters in the conduct of the corporation, but they would be simply in the same line of thought. We are clearly of the opinion that the testimony shows an acceptance of the contract, and that therefore the district court erred in its findings for the defendant. See further upon the questions in this case, *Howe v. Keeler*, 27 Conn. 538; *Krider v. Western College*, 31 Iowa. 547; *Insurance Co. v. De Wolf*, 8 Pick. 56; *E. Rld. Co. v. Benedict*, 5 Gray, 561; *Olcott v. Tioga Rld. Co.*, 27 N. Y. 546; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Moss v. Rossie Lead Co.*, 5 Hill, 137; *Green's Brice's Ultra Vires*, chapters 3 and 6.

The judgment of the district court will be reversed, and the case remanded with instructions to grant a new trial.

All the Justices concurring.

SELLERS V. PHOENIX IRON CO.

(13 Federal Rep. 20. U. S. Circuit Court, Eastern District of Pennsylvania, 1881.)

Equitable relief against family combination within the corporation. It is sufficient ground for equitable interference that complainant, who is a stockholder of a corporation, alleges that the officers of the corporation, who are members of one family and own a majority of the stock, have combined to appropriate the profits of the corporation in the form of salaries, and through a contract with the firm of which they are members, and have also combined to keep complainant in ignorance with regard to these transactions.

Demurrer to Bill in Equity.

This was a bill by George H. Sellers against a corporation known as the Phoenix Iron Company, and against its officers and directors individually. The allegations of the bill were in substance: *

That the Phoenix Iron Company was originally organized out of the firm of Reeves, Buck & Co., which was composed of David Reeves, Samuel J. Reeves, Robert S. Buck and Samuel A. Whitaker, and that at the time of the incorporation the said Robert S. Buck withdrew, the stock being divided among the remaining members of the firm, with the exception of a few shares transferred to employes to provide for filling the offices and the board of directors; that David and Samuel J. Reeves afterward died, but that their stock continued to be held, and was still held, by their families; that complainant had become the owner by purchase of the stock originally owned by Samuel A. Whitaker, but that all the other stock was held by the families of said David and Samuel J. Reeves, most of it, amounting to a large majority of the whole capital stock, being held or controlled by David Reeves, son of Samuel J. Reeves, and by William H. Reeves, either in their own names or as trustees under the will of Samuel J. Reeves; that said David Reeves was president of the corporation, and William H. Reeves one of the directors; that the business of the corporation was extensive and prosperous, but that the profits

were absorbed by excessive salaries to the officers; that instead of making its contracts for bridge building, which was an extensive branch of its business, directly with its customers, the corporation had entered into an agreement with the firm of Clarke, Reeves & Co., of which firm David Reeves and William H. Reeves were partners, the terms of which agreement were concealed from complainant, but which obliged the corporation to take all contracts for bridge building in the name of the firm, and to divide the profits with the firm in a proportion not known to complainant; that the corporation had spent large sums in unnecessary and costly improvements; that although it had made large profits the dividends declared were very small; that complainant was refused all information with regard to the affairs of the corporation, and denied access to the books and papers; and that although he had attended the meetings of the stockholders and endeavored to obtain information, he had been defeated by the majority of the stock controlled by the Reeves family.

The bill prayed—

(1) For an account of the assets and liabilities of the corporation and of the receipts and disbursements since complainant became a member; (2) that the president and board of directors be compelled to divide the profits *pro rata* among the stockholders; (3) that they be enjoined from expending in capital improvements sums which ought to be divided as profits; (4) that they make discovery by production of the books and papers of the corporation; (5) that the sums improperly drawn from the corporation might be returned; (6) that disclosure be made of all sums made out of dealings with the corporation by any firm of which its directors were partners; (7) that all dealings between the corporation and such firm be enjoined; (8) that all moneys due by the president or directors be paid to the corporation.

To this bill respondents demurred.

SAMUEL W. PENNYPACKER and JOHN G. JOHNSON, for complainant.

CARROLL S. TYSON, R. C. McMURTRIE, and WAYNE MACVEAGH, for respondents.

BUTLER, D. J.

While the bill in this case is inartificially and loosely drawn, and contains much irrelevant and impertinent matter, it substantially charges that the stock of the corporation, in which the plaintiff is a shareholder, is mainly owned by the members of one family, who combine to manage the affairs of the corporation in such way as to subserve their own individual interests, to the prejudice of the plaintiff's rights; that David Reeves is president, and William H. Reeves, Carroll S. Tyson, Charles R. Scull, and John Griffin are directors; that the directors pay to themselves large and excessive salaries as officers of the company; that notwithstanding the chief business of the corporation is, or was intended to be, the building of bridges, the president and directors have entered into an agreement with the firm of Clarke, Reeves & Co., under which agreement contracts for bridges are taken in the name of the firm, and the benefits divided between it and the company, in proportions unknown to the plaintiff; that a majority of the members of said firm are managers and officers of the corporation, to wit, David Reeves, the president, John Griffin, director and superintendent, and William S. Reeves, director and assistant superintendent, who, as such members of said firm, make large profits at the expense of the corporation by means of unlawful contracts which they, as such managers and officers, enter into, to the prejudice of the corporation; that the plaintiff has sought information respecting the affairs of the company—the salaries paid to its officers, and the character of its dealings with the said firm, but the defendants, members of the said family, or subject to its control, have combined to keep him in ignorance, by withholding such information and refusing access to books and papers from which it might be obtained; that the plaintiff attended a meeting of stockholders and there sought redress, but that his efforts were rendered fruitless by reason of the conduct of the defendants, who combined against him for that purpose.

The foregoing statement embraces legitimate ground for equitable interference—in substance, that the defendants, members of one family, and principal owners of the stock, have unlawfully combined to abstract the property of the cor-

poration and apply it to their own use in the form of salaries, and profits of the firm of Clarke, Reeves & Co., and to keep the plaintiff in ignorance of their transactions in this respect. To this extent, and to this only, the bill must be allowed to stand.

So much of the demurrer as relates to the first, second, third and seventh prayers of the bill, and the statements touching the same, is therefore sustained. As respects all other causes of demurrer assigned, the said demurrer is overruled, without prejudice, however, to the defendants hereafter.

1. Directors may compromise law suit and bind the stockholders: *Donohoe v. Mariposa Co.*, 66 Cal. 317.

2. Where a majority of the *shareholders* are referred to in the statute it means a majority of the persons holding shares and not a majority of the stock: *Chollar Mining Co. v. Wilson*, 66 Cal. 374.

3. Money advanced to pay debts of a corporation to the knowledge of its officers, though without their special request, creates a debt against the company: *Martin v. Victor M. Co.*, 8 Pac. 161.

4. Stockholders can not vote by proxy unless charter or by-laws so provide: *Com. v. Bringham*, 103 Pa. St. 134; 49 Am. Rep. 119.

5. President has no power to buy, sell or make deed of real estate without a thority of board: *Bliss v. Kaweah Co.*, 4 Pac. 507.

6. Can not appoint agent until it has legal existence: *Kelly v. Ruble*, 4 Pac. 593.

7. Foreign corporation, service on. Foreign corporation has no local existence: *Thomas v. Placerville Co.*, 4 Pac. 641; *Eaton v. St. Louis Co.*, 2 McCr. 362.

8. A copper company can not deal in iron: *Copper Mine Co. v. Fox*, 16 Q. B. 229.

9. A mining corporation can not hold by purchase a bridge building contract: *Salmon River Co. v. Dunn*, 8 Pac. 911.

CULLACOTT ET AL. V. CASH GOLD AND SILVER MINING
COMPANY.

(8 Colorado, 179. Supreme Court, 1884.)

¹ **Monuments control.** In proving the identity of a patented mining claim the rule is that monuments will control courses and distances; it is not necessary that the former be unquestionable in order to control the latter.

Courses and distances, under the authorities, are assigned the lowest place in the scale of evidence, as being the least reliable.

It is not so much the character of the monuments, as satisfactory proof of their location, that is to fix the *locus in quo*.

² **The existence and location of monuments** may become questions of fact, to be determined like other questions of fact, according to the rules of evidence.

³ **Identification of patented premises.** It is only after the entire description in a patent has been considered, and found so inaccurate as to render the identity of the grant wholly uncertain, that the grant is to be held void.

Appeal from District Court of Boulder County. The facts are stated in the opinion.

G. B. REED and J. H. DENISON, for appellants.

L. C. ROCKWELL, for appellee.

BECK, C. J.

The facts of this case are novel. Prior to the acquisition of the government title it is not an unusual circumstance for a mining claim to be entered upon and appropriated by strangers to the location. A failure on the part of the original locators to comply with any of the specific requirements of the law relating to the location of mining claims, or failure to perform annual labor within the time and of the value required after location, is often made the pretext for jumping or re-locating claims. But after the miner has complied with all requirements of State and Federal statutes—has bought and

¹ *McEroy v. Hyman*, 15 M. R. 397.

² *Du Prat v. James*, 15 M. R. 341.

³ *Rockwell v. Graham*, 15 M. R. 293.

paid for his claim, and received the patent investing him with title thereto in fee simple—it has been supposed that the jumping period has expired, and that the miner was secure in the possession of his surface ground and improvements, at least. It would seem that even this rule has its exceptions, the case before us furnishing an example. The Cash mine, at Gold Hill, Boulder county, was located by Robinson, Hock, and Sanford in November, 1872, and was surveyed for patent early in the spring of 1873. Payment was made to the government, and a duplicate receiver's receipt issued to the locators, bearing date May 15, 1873. Considerable work appears to have been done upon the property; for, in addition to the discovery shaft covered by a shaft-house, five or six other openings, or workings, upon the vein, were made. The vein is a strong one, and crops out on the surface from 500 to 1,000 feet.

A government patent was issued to the locators, February 4, 1875, for 1,500 feet in length by 50 feet in width, upon the Cash lode, being mineral entry No. 343, and lot No. 12, in Gold Hill mining district. The field notes and plat of the official survey were incorporated as part of the description. The property became, and still remains, one of the best known mining properties in the vicinity of Gold Hill. Not only was its name familiar, but the lode itself was prominent, cropping out, as stated, upon the surface, and the workings thereon being distributed along the course of the vein. Its monuments also were known, used, and referred to in the location of mining claims in the neighborhood. The government title, thus acquired, was transferred to the Cash Gold & Silver Mining Company, the appellee herein, in June, 1875, and remained unquestioned until the autumn of 1880, when the appellants took possession of the lode, surface grounds, and workings, and located what they named the Queen of May lode, with the dimensions of 1,500 by 150 feet, the Cash lode and its improvements forming the interior of the parallelogram. The only perceivable excuse for this appropriation of the property of the appellee is a misdescription of the patented premises as to courses and distances; the principal error being in the course and distance of corner No. 1 from the quarter-section corner on the east boundary of section 12,

township 1 north, range 72 west of the sixth principal meridian. The bearing of the quarter-section corner from corner No. 1, as stated in the patent, is N. $83^{\circ} 39'$ E. and the distance 1,403 feet; whereas recent surveys make the correct bearing N. $75^{\circ} 58' 37''$ E. and the actual distance 1,365.2 feet.

The surveyor who made the official survey for patent had died before the date of the trial below, and no witness was able to say whether the line described as tying corner No. 1 to the quarter-section corner had been actually run and measured or estimated only. It is probable, however, that it was merely estimated; since the testimony shows that it would be difficult to measure it on a true course, on account of the rough and broken condition of the ground. The appellants, relying upon this error to justify their appropriation of the patented premises, gravely contended that the ground called for in the patent lay wholly outside the Queen of May location. In support of this theory they caused a survey to be made of a certain parcel or plat of ground, having the same dimensions described in the patent; the lines being run from the initial point indicated in the patent as corner No. 1, computing the locality of such point from the quarter-section corner by course and distance. The tract thus laid off was duly platted, and labeled "Cash Lode," although it was in fact 200 feet distant from the boundaries of the patented premises at the nearest point. This plat and survey, together with a plat and survey of the so-called Queen of May lode, were exhibited, to show that no conflict existed between the two locations. But this farce was duly exposed on the cross-examination of the appellant's surveyor, who was forced to admit that, in establishing the exterior lines of the Queen of May location, he had included within its boundaries the discovery shaft, shaft-house, and surface improvements of the Cash lode.

Other discrepancies in the patent, as tested by recent surveys, were in the length and width of its surface ground, and in the bearings of its side lines. Instead of being 1,500 feet in length by 50 feet in width, it was found to measure only 1,378 feet in length by 46.6 feet in width, and a variance of $1^{\circ} 49'$ was discovered in the bearing of its side lines. The shortage in measurements was explained by the facts that the surface is hilly and uneven, and that the measurements in the original

survey were along the slopes, or surface, whereas the recent measurements were horizontal. Lines laid off by the former method would necessarily fall short when tested by the latter method. But the identity of the patented premises does not depend upon courses and distances alone. There were other calls in the patent. It calls for a "*granite rock in mound of stones*" at each of the four corners of the surface ground. The plat, incorporated as a part of the description, shows the location of the discovery shaft. And another fact of importance is that the name of the lode or mine is given. Several errors are assigned to the rulings of the court upon the trial, and to the instructions given and refused; but the controlling question in the case is, were the premises in controversy properly and sufficiently identified as the premises described in the patent.

Counsel for appellants contend that monuments, to control courses and distances in the description of real estate, must be *unquestionable*; otherwise, courses and distances must prevail. They further contend that a rock in a mound of stones, in a country abounding in rocks and stones, is not an unquestionable monument. The rule of law is that monuments will control courses and distances; and while judges, in commenting upon the facts of particular cases, speak of the monuments as being unquestionable, the rule is not so qualified. The material substance out of which monuments shall be made is not specified in the law. Their existence and location may become questions of fact, to be determined, like other questions of fact, according to the rules of evidence. All the authorities on the subject assign to courses and distances the lowest place in the scale of evidence, as being the least reliable. Mr. Washburn says this kind of evidence is regarded with great confidence in some cases, where the lines are short. He adds, however:

"But, ordinarily, surveys are so loosely made, instruments so liable to be out of order, and admeasurements, especially in rough or uneven land or forests, so liable to be inaccurate, that the courses and distances given in a deed are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries that are referred to in the deed as indicating and identifying the land." 3 Washb. Real Prop. (4th Ed.) 403.

That it is not so much the character of the monuments, as satisfactory proof of their location, that is to fix the *locus in quo*, is shown by the adjudged cases. In *Lodge v. Barnett*, 46 Pa. St. 484, it is said:

"The courses and distances in a deed always give way to the boundaries found upon the ground, or supplied by the proof of their former existence, where the marks or monuments are gone. So, the return of a survey, even though official, must give way to the location on the ground, while the patent, the final grant of the State, may be corrected by the return of survey; and if it also differs, both may be rectified by the work on the ground."

In *Opdyke v. Stephens*, 28 N. J. Law, 89, the court says:

"But the rule is well settled that boundaries may be proved by every kind of evidence that is admissible to establish any other fact."

Smith v. Prewitt, 2 A. K. Marsh, *185, is cited in support of this proposition. In *Tyler, Bound.* 285, it is said:

"Where monuments—for example, stakes, stones or a tree—are referred to in a deed, parol proof is always admissible to show their location."

Tested by these rules and principles, we think the original boundaries of the Cash lode were established by competent testimony on the trial, and that the jury was fully warranted in finding that the appellants had unlawfully entered upon and taken possession of said lode. Three, out of the four monuments called for, were identified by witnesses who had known its boundaries for from five to eight years; one of them being a deputy United States mineral surveyor, who had been accustomed for several years to survey mining claims in the neighborhood, and who stated that he had tied surveys of other properties to its corners probably one hundred times. There was no question of conflicting lines or surveys here, but simply a question of identifying the patented premises as a whole. The effect of the doctrine contended for by the appellants would be to declare the grant void for uncertainty. But it is only after the entire description in a patent has been considered, and found so inaccurate as to render the identity of the grant wholly uncertain, that the grant is to be held void: *Boardman v. Reed*, 6 Pet. 345. It

is plain that no such consequence could result here; for the identity of the property in controversy as the Cash lode, was known to the witnesses of both sides. This being the name under which it was granted and under which it had been for years held, worked, and generally known, the name alone would be a sufficient description to prevent a forfeiture: Sedg. & W. Tr., Title, Land, § 461. We regard the proof of identity as leaving no reasonable ground of doubt that the property recovered is the same property described in the patent. The irregularities complained of are of minor importance. None of them are deemed of sufficient importance to warrant a reversal.

The judgment will therefore be affirmed.

McEVOY ET AL. v. HYMAN.

(25 Federal Rep. 596. U. S. Circuit Court, District of Colorado, 1885.)

Maintaining stakes. Whatever may be the duty of a locator to maintain his stakes, he can not be expected to renew, as early as January, stakes set up the previous fall.

¹ **Monuments control course and distance.** The discovery cut and stakes are monuments.

² **A location certificate calling for its own discovery cut and its own stakes** is defective when it contains no reference to a natural object or permanent monument (to fix the locus of the claim).

Amendment to location certificate favored—Re-location retroactive. The first record of a mining claim is usually, if not always, imperfect, and it is the policy of the law to give the locator an opportunity to correct his record when defects are found therein, and when it is so corrected the amendment takes effect with the original as of the date thereof.

At Law.

PATTERSON & THOMAS, for plaintiffs.

H. M. TELLER and CHARLES J. HUGHES, JR., for defendant.

¹ *Cullacott v. Cash Co.*, 15 M. R. 392.

² *West Granite M. Co. v. Granite M. Co.*, 17 Pac. 547; *Duryea v. Boucher*, 67 Cal. 141.

HALLETT, J.

Ejectment to recover a mining claim called "Little Giant," located by plaintiffs on the public lands, in the month of January, 1880. Defendant asserts title to part of the same ground under another location made in the month of October, 1879, and called "Durant." As it is of earlier location, the latter must be of superior force, if it was regularly made and properly maintained to the time this suit was brought. That the locators of the Durant went upon the ground in August, 1879, and opened the vein in the manner and to the extent prescribed by statute is fully shown. It seems that the vein crops out in places on the surface of the mountain in a way to show it is a strike for a long distance. Before August, 1879, two locations had been made on the vein in the lower part of the mountain; of these locations, the one furthest north was made by the locators of the Durant, and called "1,001." Following that, in a southerly direction, was the Spar claim, located by Philip W. Pratt and others. Near the southerly end of the Spar claim the vein came to the surface, and there, with the consent of the owner of the Spar, the locators of the Durant made their discovery, opening a cut thirteen feet or more in depth. To enable the Durant men to put their discovery in that place, the Spar owners gave them permission to move the Spar stakes to the north, so as to exclude from the Spar claim the ground where the discovery cut of the Durant was made; and there is evidence to the effect that this was done. Some witnesses, however, testify that the Spar stakes remained in their original position during the following winter, and perhaps a longer time.

The circumstance that the Spar people did not afterward make claim to that part of the vein, and excluded it from their application for patent, sufficiently proves that they had relinquished it to the locators of the Durant; and whether the Spar stakes were reset in the fall of 1879 is not, under the circumstances disclosed by the evidence, an important fact in determining the rights of parties to this controversy. The Spar location was not then complete; no record had been made of or concerning it, and the change of lines did not encroach on territory previously appropriated by others. When

they first entered on the ground, the locators of the Little Giant had actual notice of the Durant location in a way to put them upon inquiry touching its force and validity, and they openly and anxiously sought to find some defect in it. Under these circumstances, if they failed to make full inquiry, or too readily accepted the position of the Spar stakes as evidence of invalidity in the Durant claim, they can not now be heard to say that they were misled to their prejudice. It may be only a question of fact whether the Durant location was founded on a discovery and work done within the limits of the Spar claim; but if it is more, and the plaintiffs could, under some circumstances, say that they were misled by the position of the Spar stakes, it can not be so here. Inquiry of the Spar owners, the parties chiefly concerned in any attempt of others to take away Spar ground, would have set the plaintiffs right; and the omission to make such inquiry was of their own negligence. Assuming that the discovery cut of the Durant was, by the relinquishment of the Spar owners, in ground free and open to occupation, the next question in the order of objections made by plaintiffs is whether that claim was properly marked on the ground. On this point there is a great mass of testimony from both parties; on behalf of defendant, to the effect that stakes were properly set as required by the statute of the State (Gen. St. 723) in the autumn of 1879, when the location was made; that these stakes were seen by disinterested parties in the same year, and after the locators of the Durant had departed from the district, and by other persons in the spring and summer of the year 1880; and the stake at the southeast corner was found when the survey was made, in the month of May, 1881. On behalf of plaintiffs the testimony is that diligent search was made in the direction in which the claim was supposed to extend, by quite a number of persons, at various times during the year 1880, and no stakes could be found. In this conflict of testimony, it is only necessary to say that the weight is with the defendant. Assuming that all the witnesses were equally worthy of credit, those who testify affirmatively that they put the stakes in position, or that they saw them in place, must be taken to have better knowledge of the subject than those who say that the stakes could not be found. It appears that some of the wit-

nesses who were unable to find stakes examined the ground in winter, when the snow must have obstructed the view, and the circumstances attending the inspection of others may not have been favorable to a correct result. Upon the evidence, I conclude that the boundary stakes of the Durant were properly set when the location was made.

As the Little Giant was located in January following, no question is presented as to diligence on the part of the locators of the Durant in keeping the stakes in position. Whatever the duty of a locator of a mining claim as to maintaining his stakes, having set them up in the autumn, he can not be expected to renew them in January following.

In the course of testimony at the trial a question was made whether the notice posted at the discovery cut of the Durant gave the direction of the vein; but it was conceded in argument that the statute did not require it. The notice at all times maintained at the discovery cut seems to have been full and complete under the statute, and no point is now made against it. The chief objection to the Durant location is founded on the original certificate, which was filed for record in the proper office November 20, 1879. This, it will be observed, was before any step was taken toward the location of the Little Giant, and the objection is not as to the time it was made or filed for record, but it is said that the ground now claimed as the Durant location is not described in it, and it contains no reference to a natural object or permanent monument, as required by section 2324 of the Statutes of the United States. The description in the certificate is as follows:

"Beginning at corner No. 1 southwest, thence east, 63 degrees south, 300 feet, to stake No. 2; thence north, 27 degrees east, 750 feet, to stake No. 3; thence in the same course 750 feet, to stake No. 4; thence west, 63 degrees north, 300 feet, to stake No. 5; thence south, 27 degrees west, 750 feet to stake No. 6; thence in the same course 750 feet, to place of beginning. Said lode situated on Aspen mountain. Discovered August 13, 1879. Work done by open cut, twelve-foot face."

Beginning at the southwest corner, as it was actually located in the survey for patent, and following the description as given in the certificate, the claim assumes a rhomboidal shape, extending somewhat south and west of the survey as

made, and embracing little more than one half of the territory covered by the patent survey. It excludes the southeast corner stake and the discovery cut. To avoid this result the surveyor who made the patent survey read the first course in the certificate, which is the south end line of the claim, as south 63 degrees east, instead of east 63 degrees south, as written; and the third course, which is the north end line of the claim, as north 63 degrees west, instead of west 63 degrees north, as written. So understood, the courses are approximately correct, but it is still necessary to allow something like four degrees in all the courses for the inaccuracy sure to occur in the rude efforts of miners to give courses and distances. In the amended survey the first course is south 58 degrees 52 minutes east, and the second course is north 31 degrees 8 minutes east and so on. In support of his interpretation of the description in the certificate the surveyor says that the intention of the locators to make the claim rectangular in shape is clearly apparent, and he was governed by the only monuments that could be found—the southeast corner stake and the discovery cut. The reason last stated appears to be sufficient, for monuments are to be followed in preference to courses and distances when the latter do not agree with the former: *Pollard v. Shively*, 5 Colo. 309. And I think the discovery cut is to be recognized as a monument so far, at least, as to include it within the claim. When the point of discovery is marked, as required by statute, to exclude it from the claim would be most extraordinary. For, as the discovery is essential to a valid location, it must be presumed that the locators intend to secure that point in preference to all other parts of the claim. The lines as drawn by plaintiffs from the certificate alone exclude the only ascertainable monuments, and that is sufficient ground for rejecting them and sustaining the patent survey. So understood, however, the certificate is still defective; for, as we have seen, the courses and distances were not correctly given, and it contains no reference to a natural object or permanent monument, as required by section 2324 of the Revised Statutes of the United States. By one section of the statute of the State a certificate so defective is declared to be void, but another and subsequent section gives the locator or owner of a claim the right to amend such defects: Gen.

St. § 16, p. 722, and section 25, p. 724. See, also, this statute, as first enacted by territorial assembly, tenth session, 186.

The section relating to amendments is as follows:

"Sec. 25. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which had been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator, or his assigns, may file an additional certificate, subject to the provisions of this act: provided, that such re-location does not interfere with existing rights of others at the time of such re-location; and no such re-location, or other record thereof, shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location."

It will be observed that the section provides for correcting errors and defects in a certificate of location as well as for changing the boundaries so as to take in territory not before embraced in the claim. Doubts have arisen as to whether the proviso in relation to existing rights is applicable to the clause which refers to errors and defects in the certificate. The better opinion appears to be that the proviso relates only to the matter of taking into the claim new territory. Apparently that was the matter to which the attention of the legislative assembly was chiefly directed. It is, perhaps, unfortunate that the question of amending a certificate and of changing the boundaries of a claim, which amounts to a re-location, should be expressed in general terms relating to both subjects, and in one section of the law. But the confusion resulting from such an attempt should not obscure the purposes of the law. Errors and mistakes in certificates of location are of frequent occurrence. Under the law as it is at present a full, complete, and unimpeachable certificate can not be made without the aid of a surveyor and the best instruments; and, with such aids, the surveyors often disagree, and time and labor are required to decide between them. Of course it is often, and perhaps generally, impracticable to obtain the services of a surveyor in making a location, and the miner must depend upon his

own skill and judgment. In such effort he usually fails. Indeed, it may be said as to the course of his lines he is always in error; and the natural object and permanent monument required by section 2324 of the Revised Statutes are entirely beyond his-grasp. He does not know what they are, or how to refer to them. Every one who is at all familiar with mining locations knows that, in practice, the first record must usually, if not always, be imperfect. Recognizing these difficulties, it has never been the policy of the law to avoid a location for defects in the record, but rather to give the locator an opportunity to correct his record whenever defects may be found in it. Such seems to be the meaning of the first clause of the section above. If at any time a certificate shall be found defective or erroneous it may be amended; and section 16 of the same act, which declares that defective certificates shall be void, when read in connection with this section and qualified by it, will be understood as saying that defective certificates are lacking in force and sufficiency until amended as provided in section 25, but not wholly void. A void thing is null, and not subject to amendment. A thing *in esse* is a condition precedent to the exercise of the power of amendment, for a living graft can not be put on a dead stock; therefore it is not correct to say that an imperfect certificate is void; when amended it has full life, and the amendment takes effect with the original as of the date of the latter. This is the function and proper office of an amendment—to put the original in perfect condition as if it had been complete in the first instance. The case of *Strepey v. Stark*, 7 Colo. 614, seems to support these views. The facts were different in that case, but the right of a locator to amend his certificate was recognized.

After the original certificate of the Durant location was amended, that certificate and the amendment were properly received in evidence as constituting a perfect certificate having effect from the date of the original, and no objection to the record of that claim is found. In this view, the Durant title is superior to the other, and must prevail. The other questions in the case may be passed without discussion. The judgment will be for defendant.

1. Sufficient description in lien proceedings: *Curnow v. Happy Valley Co.*, 68 Cal. 262.

¹ UPTON ET AL. V. LARKIN ET AL.

(17 Pacific, 728; 7 Montana——. Supreme Court, 1888.)

² Necessity of maps. The court would be justified in discarding assignments of error based on testimony given with a map before the witness to which he refers when such map is not produced to the reviewing court.

Where the position of a discovery becomes material, as to whether made on or off patented ground, it is for the proper party to prove where it was made and the answering party afterward to show, if they can, that it is on such ground; the examination should not be interrupted to prove at that stage the existence of the patent.

Discovery shaft on the line of an elder claim, and thus partly on and partly off clear ground, will sustain a location.

Sufficiency of description in notice. A notice of location of a mining claim distinctly marked upon the ground, describing the west-end corners as marked by pine trees, while it appears that they were in reality marked by stakes, the notice, however, referring to a permanent monument, to wit, "the Gambetta lode claim on the east," contains a sufficient description.

Evidence of the value of a vein, disclosed after the location, is immaterial to the question of the locator's title, as no discovery after location would make that location valid.

³ Discovery of mineral made after location will not validate a location made without any discovery of mineral before location.

Sufficient instruction as to discovery. An instruction that "to make a valid location of a lode mining claim, there must be a discovery, within the limits of the claim, of a vein * * * containing gold, silver, or other valuable mineral deposits, * * *" is proper, when taken in connection with other instructions defining and limiting what is meant by a "discovery."

Appeal from District Court, Silver Bow County; GALBRAITH, Judge.

KNOWLES & FORBIS and THOS. L. NAPTON, for appellants.

W. W. DIXON, and ROBINSON & STAPLETON, for respondents.

BACH, J.

¹ S. C. on former appeal, 5 Mont. 600; 6 Pac. 66.

² *Albion Co. v. Richmond Co.*, 8 Pac. 480; 19 Nev. 225; *Story v. Maclay*, 5 Pac. 326.

³ There must be discovery: *Erhardt v. Boaro*, 15 M. R. 473. But the cases seem to hold that a post-discovery would stand, no adverse rights intervening: *Crossman v. Pendery*, 4 M. R. 431; *North Noonday Co. v. Orient Co.*, 9 M. R. 529; *McGinnis v. Egbert*, 15 M. R. 329.

This suit was begun under Rev. St. U. S., § 2326, to determine the right of adverse claimants to certain mining property situated in Silver Bow County, Mont. The defendants had filed an application for patent to mining ground, including the ground in controversy, as the owners of the "Smelter Lode Claim;" the plaintiffs "adversed" the application, and thereafter commenced suit as required by the United States statute for adverse claimants, alleging title to the premises under a claim known as the "Comanche Lode Claim." The defendants deny plaintiffs' title, and claim title to the ground in controversy as part of the "Smelter Lode Claim." Trial was had in the district court, verdict was for the plaintiffs, and judgment was entered accordingly. A motion was made for a new trial, which was denied. The appeal is taken from the judgment, and from the order denying a new trial. We will consider, in their order, the alleged errors relied upon by the appellants, at least so far as the record will permit.

Counsel for appellants, in their argument, admit that the record contains much useless matter; and after inspection of the record we are free to say that we agree with them. David N. Upton was the first witness called, and he was asked the following questions, to which he made answer: "*Question.* Did you know where the corners and boundary lines of the Shannon lode claim were at that time? [Referring to the time of the discovery and location of the Comanche lode claim.] *Answer.* Yes, sir. *Q.* Show where they would be on this map. [Referring to a map already in evidence.] *A.* The Shannon is a new location of the old Colusa, located by 200-foot claims. Here, on the line of the Shannon, [now referring to the map] at that time the lines of the Shannon were right up here [referring to the map]. Objected to by attorney for defendants, on the ground that the Shannon is a patented claim now, and it is not open to any dispute or controversy as to where the boundaries were at that time. Plaintiffs' attorneys say that it does not yet appear that the Shannon is a patented claim. Whereupon defendants' counsel desired to ask the witness if he did not know that the Shannon claim was patented, and offered to introduce then and there the patent to the Shannon claim. The court overruled the defendants' objection; to which ruling the defendants then and there duly excepted. The witness then pro-

ceeded to point on the map and testify as to the position of the Shannon corners and boundaries at the time he made the location of the Comanche lode claim, and stated that the position of the Shannon corners at that time would bring the south line of the Shannon about one hundred feet north of the discovery shaft of the Comanche. To the admission of said testimony the defendants then and there objected, but it was allowed to go to the jury, and to which ruling of the court the defendants then and there excepted." The foregoing is contained in bill of exceptions No. 1, and it is the first error noted in the brief of counsel for appellants. It is strange that the map referred to should be entirely omitted from the record, which is so voluminous, and which contains so much that is irrelevant and redundant. It certainly would be in line with the authorities if we refused to consider this error, for we are deprived of much that may have guided the court below. As far as the record shows, we find no error in the ruling of the court below. It was certainly competent for the plaintiffs to prove the discovery upon which they based their claim. They could do this by fixing its distance from any object. Upton swore that the old south lines of the Shannon lode were 100 feet distant north from his discovery. It was not in accordance with the orderly examination of the witness to allow the defendants to interrupt their testimony, and to interject cross-examination in the way proposed. The proper and usual practice was for the defendants to show, by cross-examination or by testimony in defense, that the patented lines of the Shannon lode were south of the old lines, and took in the discovery. That was part of defendants' case.

The second alleged error refers to the admission of the notice of location in evidence. The ground of objection is as follows: The evidence of the plaintiffs having shown that Upton and his co-locator, Turner, discovered a vein, and made a location by putting up stakes at the west end corners, the defendants objected to the admission of the notice of location, because it was therein declared that the west-end corners were marked by pine trees. The objection was properly overruled. The statutes of the United States do not require the recording of any notice of location. All that is said upon that subject will be found in section 2324, which provides as follows: "The location must be distinctly marked on the ground, so

that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locator or locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." The Montana statute makes no further requirement in this respect. The statutes of the United States require only "such a description * * * by reference to some natural object or permanent monument, that is, either one or the other; but, whichever is chosen, it must be sufficient to identify the claim." The notice objected to did refer to a permanent monument, to wit, "the Gambetta lode claim on the east." Such a reference has been held to be sufficient by this court. See *Russell v. Chumaseero*, 4 Mont. 309. Whether or not this was such a description as would identify the claim is a question for the jury. See *Russell v. Chumaseero*, *supra*; *Anderson v. Black*, 70 Cal. 226. The notice, then, contained a description by reference to a permanent monument. It contained more, also; but the claim itself was distinctly marked on the ground—so distinctly that "its boundaries can be readily traced," as required by the statute. The location notice contains a declaration that a copy thereof is posted at the discovery shaft (and the evidence is to the same effect). It also declares that the claim adjoining it is the Gambetta lode claim on the east; and then it contains the following description of the boundaries of the claim located, as follows: "Beginning at a stake situated 900 feet in a southeasterly direction from discovery shaft, and marked 'South-East Corner of the Comanche Lode Claim;' running thence westerly 1,500 feet, to a pine tree, marked 'South-West Corner of the Comanche Lode Claim;' thence north 600 ft., to a pine tree, marked 'North-West Corner of the Comanche Lode Claim;' thence easterly 1,500 feet, to a stake, marked 'North-East Corner of the Comanche Lode Claim;' thence south 600 feet, to the place of beginning." As we have already stated, there is no statute requiring a description of the claim to be contained in the notice of location. All that is required by the United States statute is that the claim shall be distinctly marked upon the ground, so that its boundaries can be readily traced. The court charged the jury that such was the law,

and the jury, by their verdict, have declared that the law was complied with, to wit, that the claim was marked as by law required. The mining laws are beneficial laws. They should not be, and are not by the United States Supreme Court, construed technically. The history of the laws shows that they were intended to afford to the miner the most simple method possible of obtaining title to mineral ground. When metal was first discovered in this country, the miners made their own laws, known as "custom of miners," and which may properly be called the common law of mining. These laws received the sanction of the State legislatures and of the courts. Finally, Congress, recognizing the vast importance of the mineral wealth of this western country, as well to the nation as to the individual, and being desirous of encouraging the industry to its fullest extent, wisely took cognizance of the subject, and enacted the mineral land laws, which are as simple as the custom of miners; indeed, the fundamental principles of the one are identical with those of the other, to wit, discovery, appropriation, and development. In fact, there is little difference between the custom of miners and the mineral laws, as far as the former could go; that is to say, up to that point where the miner seeks to obtain his patent. The law as passed by Congress contains no extra condition to the possessory right (see *Jennison v. Kirk*, 98 U. S. 453); but it gave to the miner what he had not had before, the right to acquire the absolute title to the land through a United States patent to the same. Congress was enlightened upon this subject by those well versed in the necessity arising from the nature of the mining industry. It recognized that the rules of miners were the result of experience, and the device of fair-minded men. It wisely followed rules which were best suited to those engaged in this industry, which recognized that the vast majority of the miners were not educated, and which were to govern men remote from business circles, where alone legal advice could be had. What are the two chief requirements of the statutes as far as the possessory right is concerned? *First*, discovery; *second*, the marking of the claim upon the ground so that the boundaries can be readily traced. The first requirement is made for the benefit of the United States, so that land can not be acquired under this law until its character is first

ascertained to be mineral; the second is made in order that those going upon the ground may know that others have acquired and claim title thereto. Certainly, these steps are very simple; the intricacies are those found by the courts of the States and Territories wherein mineral lands are situated. The Supreme Court of the United States has, time and again, cleared away a vast amount of technicality sought to be thrown around these laws, as a careful perusal of the decisions of that court will show. Counsel for appellant have cited cases from the State of Colorado upon this point; but those cases depend upon a statute of that State which requires that "such surface boundaries shall be marked by six substantial posts, hewed or marked on the side or sides which are toward the claim, and sunk in the ground, to wit, one at each corner, and one at the center of each side line." We have no statute such as that, or requiring any stake whatever.

The next error specified is that one of the defendants, Larkin, was not allowed to testify as to the width and richness of the vein as shown by work subsequent to the location of the Smelter lode. We think that the objection was properly sustained. Whether or not the defendants were entitled to recover depended upon discovery before location. No discovery made after location would make that location valid. Such would seem to be the rule stated in the opinion delivered upon a former appeal in this case (see *Upton v. Larkin*, 5 Mont. 600), the present appellants then insisting that such was the rule of law, and, in fact, the appellants requested the court below to charge the jury that such was the law. (See instruction 5 given at defendants' request, as follows: "The discovery upon a quartz claim must be made at the time of the location, and before the record of the claim is made.") The court, upon the former appeal, cited an instruction given by Mr. Justice Sawyer in the case of *Jupiter Co. v. Bodie Co.*, 11 Fed. 686, and the court adds: "This instruction, if it is the law, would be applicable to a case where a person enters upon the public mineral lands, and discovers what he supposes to be a vein or lode, and makes a location by virtue of such discovery before he has discovered the true vein or lode, and subsequently, and before any other person has acquired any rights, makes such discovery." But in the case at bar, the

location of the Smelter lode was made on the 23d day of May, 1881; a patent was applied for prior to the 7th day of March, 1882; this action was commenced on the 7th day of March, 1882; and this evidence was offered at the present trial of this cause, in September, 1886. Certainly, the appellants could not obtain a patent upon a discovery made after application. That they can not show work done after bringing of suit has been held in *Moxon v. Wilkinson*, 2 Mont. 421. The offer made by appellants was not confined as to date, and may as well have been after suit was brought as before. When this offer was made there had been no attempt to deny that appellants had discovered a vein before their location; and the appellants did not seek to introduce it in order to make valid a void location, as referred to in the opinion of the learned judge commenting on the instruction of Mr. Justice Story, *supra*. The purpose of the offer is evident; it was to enlist the sympathy of the jury. That the defendants did not suffer any wrong by the exclusion of this testimony is further shown by the finding of the jury that the defendants did discover "at the time of his location, within the limits of the Smelter lode, a vein with at least one well-defined wall."

The next error alleged is that the evidence shows that the Shannon lode claim as patented includes the discovery of the Comanche lode claim; and counsel for appellant cite *Gwillim v. Donnellan*, 115 U.S. 45. In that case the discovery relied upon by the plaintiffs was entirely included within the boundaries of a claim that was patented after the plaintiffs' location; but in the case at bar, testimony was introduced by plaintiffs tending to show that only a portion of plaintiffs' discovery shaft is included within the Shannon claim, and that the other portion is included within the line of the Comanche lode claim. The jury was instructed as to the law upon this point, at appellants' request. They were told that the discovery must have been made "upon the claim located; but, if the ground upon which the claim is located is appropriated ground—that is to say, ground that has been previously located, and is at the time held as a quartz lode claim by others—then such a discovery will not sustain a location, and any location made by virtue thereof will be void. And if you find in this case that the discovery of the Comanche lode claim was made upon

the Shannon lode claim, then you will find that the location of the Comanche lode was void, and the plaintiffs acquired no rights thereunder." And there were other instructions to the jury to the effect that, if the discovery shaft of plaintiffs was within the Shannon lode claim as patented, then plaintiffs could not recover. The jury find specifically that a portion of the discovery is south of the south boundary line of the Shannon claim as patented, and within the lines of the Comanche as located. There is evidence to sustain the finding, and such a finding of fact is sufficient to show a valid discovery; therefore the verdict of the jury can not be disturbed upon that ground.

The next error alleged is that the court erred in instructing the jury as contained in plaintiffs' requests numbered 1 and 2; and appellants claim that these are not the law under any circumstances, and that they are particularly against the law as applied to the facts of this case. Both the plaintiffs and the defendants presented numerous requests to charge, which were given by the court as instructions to the jury. They thus became the directions of the court, and must be construed together. The testimony shows that the Comanche lode claim was located in January, 1879; and that in June, 1879, the Shannon lode claim, which lies north of the Comanche, was patented. The south line of the Shannon lode, as the testimony shows, runs directly through the discovery shaft of the Comanche, in such a manner that the shaft, with the exception of a strip about nineteen inches wide, is included within the Shannon lode. Plaintiffs filed no adverse claim at the time that application was made for said patent. There is testimony showing that the vein upon which the discovery of the Comanche is based, dips from the north to the south. Such are the facts. Instruction No. 1 reads as follows: "To make a valid location of a lode mining claim, there must be (1) a discovery, within the limits of the claim located, of a vein or crevice of quartz or ore, with at least one well-defined wall on a lead, lode, or ledge of rock in place, containing gold, silver or other valuable mineral deposits; (2) the location must be distinctly marked on the ground, so that its boundaries may be readily traced; (3) a declaratory statement in writing, under oath, describing such discovery and location, with such

a description of the claim located," etc. The rest of the instruction is not complained of. No. 2 reads as follows: "If the jury find, from the evidence, that plaintiffs, Upton and Turner, did, on or about the 19th day of January, 1879, make a valid location of the Comanche lode claim, as described in the foregoing instruction, and that plaintiffs, prior to March 7, 1882, acquired the title of said Turner, and that on the 7th day of March, 1882, plaintiffs were in possession of said Comanche lode claim, you will find for plaintiffs." The position of the appellants is that the jury are led to suppose by instruction No. 1 that the original discovery would be sufficient, even though it was upon ground which was afterward patented to others than the plaintiffs, or those under whom they claim. Turning to instruction No. 8, given at plaintiffs' request, we find that the word "discovery," which in mining has a technical meaning, is defined to the jury, who are told that "one may discover a vein within the limits of ground claimed; yet, if the top or apex of such vein lies without his claim, he will acquire no right thereto." In another instruction, at defendants' request, the word "apex" is defined to the jury. And again, in No. 6, given at defendants' request, the jury are instructed directly upon the point made by appellants, as follows: "The ownership of or title to a vein is determined by its top or apex; and although one may discover a vein within the limits of ground claimed, yet, if the top or apex of such vein lies without his claim, he will acquire no right thereto. And in this case, if plaintiffs discovered a vein the top or apex of which lies within the limits of the Shannon lode claim, as the same is described in the patent issued to Charles X. Larabie, then the plaintiffs can claim no rights by virtue of such discovery, although such vein may so far depart from a perpendicular, in its downward course, as to enter the ground claimed as the Comanche lode claim." We think that the jury are fully instructed upon the law of discovery, as applied to the facts of this case. It is true that plaintiffs' instruction 1, by itself, does not contain all the law as applicable to the case; but, taken in connection with other instructions given, it does state the law fully. It is almost identical with No. 1, given at defendants' request. As to instruction No. 2, it refers to all the issues in the case as fully

explained elsewhere, and tells the jury that, if they find all of the issues in favor of the plaintiffs, then the verdict must be for the plaintiffs.

The next alleged error is that the evidence shows that the vein of plaintiffs runs cross-wise of their claim, and not length-wise. If we could find from the record that such was the fact, it would be doubtful whether or not we could reverse the judgment on that ground. It would seem to be the opinion of the court in *Argentine Co. v. Terrible Co.*, 122 U. S. 478, and *Flagstaff M. Co. v. Tarbet*, 98 U. S. 478, that the only result in such a case is that the so-called end lines become the side lines of the claim, and the side lines become the end lines. But we are not called upon to decide that point. The jury find that the general course of the vein corresponds with the length of the claim; and we submit that it is impossible for us to say that the evidence did not warrant that finding, for the record presents the testimony in such a way that it is impossible for us to discover its meaning. The transcript contains 151 pages of testimony; but counsel on both sides, in their brief, call our attention to specific portions thereof upon all points raised upon this appeal, and it is fair to presume that our attention is thus called to all testimony that is relevant to questions before us. Of these pages there are about thirty-seven. Remembering the unnecessary length of this record, and that, as is admitted by counsel for appellants, it contains much that is irrelevant, it is difficult to understand why matters of great importance, and which undoubtedly assisted the judge and jury below, should be omitted from the record entirely. Upon the question of the direction of the vein, we are referred by appellants to the testimony of witness Baker, among others, as found on page 31. We will give a few extracts from this testimony, first stating, however, that the witness was calling the attention of the jury to a map. The witness says: "These little lines represent the bottom. That is where the top of the shaft is now. This line would show somewhere about where it crosses at the present time. This is the opening down at the bottom. This represents the ground plan at the bottom of the shaft. This is a horizontal projection of the bottom of the shaft." And in cross-examination as follows: "This being the south line of the Shannon, and this being the

surface, it is about 13 inches from there here. * * * This black line represents it at the last trial, but this is cut clear through the tunnel." There is no map in the transcript. It is impossible for us to know what the witness means by the expressions "this," "these little lines," "these black lines," or to know where "these little lines" and "this black line" may be in reference to the surface of these conflicting claims. The testimony selected as above may be somewhat more unintelligible than the rest; but in most cases it is a difference of degree, and not of kind. As to the direction of the vein, all that clearly appears from the record is (1) that the notice of location and testimony show that the side lines of the Comanche lode run in an easterly and westerly direction; (2) that there is testimony showing that the vein runs in a similar direction; and (3) that the finding of the jury is that the direction of the vein is south of east and north of west. We do not object to long records when they are necessary to present to this court a full understanding of the case; but we do object to transcripts which counsel, directly and by implication, admit contain irrelevant matter, but omit such an essential as a map from which a witness is testifying.

Judgment and order denying a motion for a new trial are affirmed, with costs.

McCONNELL, C. J., and McLEARY, J., concur.

1. Discovery of mineral after record validates the claim where no adverse rights have intervened: *McGinnis v. Egbert*, 15 M. R. 329.

2. Evidence of mineral elsewhere than in the discovery shaft is admissible: *Harrington v. Chambers*, 1 Pac. 362.

3. Where two locations are made from a single discovery only one of which could be valid, the burden of proof is on the claimant to show which one is valid: *McKinstry v. Clark*, 4 Mont. 370.

4. Proof that the discovery shaft is off the claim is admissible to prove its invalidity: *McGinnis v. Egbert*, 15 M. R. 329.

5. Discovery adit need not be under cover nor ten feet deep: *Electro-Magnetic Co. v. Van Auken*, 9 Colo. 204.

6. It is not essential that the discoverer should be the first to make the vein itself visible: *Werner v. McNulty*, 14 Pac. 643.

KRUM & PETERS V. MERSHER.

(116 Pennsylvania State, 17. Supreme Court, 1887.)

¹ **Payment out of profits—Contract making workability to a profit a matter for the purchaser's individual judgment.** Plaintiff sold to defendant his interest in a lease on a slate quarry for a small installment in cash, the balance to be paid out of the profits, with clause allowing purchasers to abandon it if they made no profits and in their estimation further working would not be profitable. After considerable expenditure the purchasers did abandon: *Held*, that their right to abandon was absolute on their making no profit, and their own belief that the adventure could not be further worked to a profit; and was not dependent upon the opinion of witnesses that they might have worked to a profit.

Error to the Common Pleas of Lehigh County.

William Mersher owned a half interest in a leasehold of a slate quarry on the lands of M. C. Hirsch, other parties owning the other half interest, and on October 20, 1883, Mr. Mersher sold his interest to W. P. Krum and B. F. Peters by an agreement under seal containing the following:

The party of the first part agrees to sell to the party of the second part one half interest of a certain lease which he holds on the property of M. C. Hirsch, situated in Washington township, Lehigh county, Pennsylvania, with all the slates on bank * * * the said half interest Wm. Mersher has granted and sold to the said W. P. Krum and B. F. Peters for a certain sum conditioned for the said sum shall be sixteen hundred dollars, of which sum two hundred dollars is to be paid at the above date, and the balance to be paid monthly out of the clear proceeds, that is, after deducting all expenses. And out of the clear proceeds, cash in hand, he shall receive the balance that is out of the one half. Should the quarry prove a failure, that no proceeds should be in the hands of the second party, or that they should abandon the quarry, believing that the quarry would not be a paying one, or a profitable one to them, in their estimation, and if the quarry had not netted any clear profit to the second party at abandoning said quarry,

¹ *Ray v. Hodge*, 15 M. R. 371; *Skidmore v. Eikenberry*, Id. 560.

then the second party shall not be responsible for any further payment, and this agreement shall be null and void and of no effect.

The purchasers under this agreement paid the cash payment, went into possession with the other owners under a new and substituted lease from the land owner, and worked the quarry from October, 1883, to June, 1884, when it was abandoned by all the lessees.

In October, 1884, Mesher instituted an action of covenant against Krum and Peters upon the agreement, assigning as breaches that, although the said quarry was a paying and profitable one, yet the defendants had not worked it and paid the monthly installments, nor did they abandon the quarry as provided and covenanted in the agreement, but had surrendered the lease so assigned to them to the lessor, M. C. Hirsch, and kept and retained for their own use all the said property, etc. The pleas were *non est factum*, covenants performed *absque hoc*, payment with notice of defalcation.

On the trial the plaintiff proved the lease and the agreement of sale, and followed with evidence tending to show, *inter alia*, that no payments had been made except the \$200 cash payment; that the quarry at the time that it was abandoned might have been worked with profit, but was not worked skillfully when it was worked, and that it was not abandoned in good faith; but no evidence was produced that any profit was made. The plaintiff being on the stand:

Q. What was the value of this property and the machinery on these premises when they left and gave up to Hirsch?
Objected to.

THE COURT: The plaintiff has offered to show that the abandonment of the quarry by the defendant was not in good faith, and that the quarry was in a condition to have been worked profitably. In addition to that, they propose to show that when the defendants did abandon the quarry, they sold or carried away a portion of the machinery and personal property which the plaintiff had transferred to them by the written agreement; and they seek to show the value of the property thus carried away, with a view of recovering for it, in addition to the demand to recover for what the profits were or would have been if the quarry had been properly worked;

the plaintiff's position being that, upon the abandonment by the defendants, the agreement as stated in it was null and void, and that the plaintiff's right to the quarry machinery and personal property there were then revived. To this the defendants object as incompetent and irrelevant and not admissible under the pleadings, which objection is overruled and a bill sealed for the defendants.*

A. It was worth \$5,000 to any party.

The defendants introduced evidence showing that the material was of such a quality that the slates were not marketable; that they had given the quarry a fair trial; that exclusive of the money laid out by themselves for new machinery, their total expenditures exceeded the value of the slate quarried by nearly \$2,000, and that after notice to the plaintiff the lease was surrendered to the lessor, because the defendants believed the quarry could not be operated with profit.

The defendants requested the court to charge that under all the evidence, the verdict should be for the defendants, which was refused.¹

The court, EDWIN ALBRIGHT, P. J., charged the jury in part as follows:

It was argued by plaintiff's counsel that there would be a profit if you did not take into account the machinery and labor. In the opinion of the court that argument is untenable. There was no profit. The plaintiff has not shown that there was any profit, nor does the defendants' evidence show any profit during the time Krum and Peters worked the quarry. The agreement says, out of the profit Mersher is to be paid, and you have the fact that it is not proved there was any profit during the time they worked, and the fact that the agreement was given up. The plaintiff then, has no claim against Krum and Peters under his own writing, except on one theory, and the question arising upon that theory will be submitted to you.

The agreement says that if Krum and Peters should abandon the quarry, believing that the quarry was not a paying one, or a profitable one to them, in their estimation, and if the quarry had not netted clear profits to the second party at the time of abandoning the said quarry, the second party shall not be responsible for any further payments. The quarry was

given up, but not with the consent of Mr. Mersher. They had a right to give it up under the writing of Mr. Mersher.

(The allegation of the plaintiff is that the agreement implies that the quarry was to be worked in good faith; that the quarry might have been worked so as to render a profit. I say to you that when this lease was given up in June, 1884, if it is proved that at that time, by ordinary diligence and ordinary business enterprise and capacity it might have been made to pay a profit, Mr. Mersher may recover, because there is implied in this agreement a covenant or understanding that they shall work it in an ordinary, workmanlike manner. Mersher's pay depended upon the profits of the quarry, and therefore the lessees, Kruin and Peters, had a right to give up the lease if they, in good faith, believed it could not be made to pay. The plaintiff says they did not give it up in good faith; that they gave it up from some other motives; and alleges that at the time the lease was given up the quarry might have been worked with profit by the defendants. If that is proved, the plaintiff may recover.)¹

If the material in the quarry was as bad as the defendants say it is, very likely you will come to the conclusion they could not work the quarry with a profit. This the plaintiff denies, and says that the stone there was as good as the average in the region where the quarry was located, and that quarries there could be operated with a profit. The lease was given up in June, 1884. If the plaintiff has satisfied you that the quarry, when the lease was given up, was of such a kind, and the material was of such a quality, and the quarry itself was of such a character as to be workable with profit, the plaintiff can recover. If that is not shown the plaintiff has no case. If you consider all the evidence on that question, and you are convinced that the quarry could have been worked with profit at the time it was given up, the plaintiff can recover, and in that event he may recover all that is owing to him under the stipulation to give him \$1,600, \$200 of which he already has. It is not enough for the plaintiff, in order to recover, to show that the defendants gave up the quarry, and nothing more, because they reserved by the writing the right to give it up.

(The plaintiff can recover on the ground, and on that ground only, that he has satisfied you that when they gave up the lease the quarry might have been worked with a profit.)²

(You will take the case and inquire as to the main question, whether the plaintiff has shown that the defendants, when they gave up the lease, by ordinary business enterprise, could have worked the quarry with a profit, and that it was not given up in good faith, and if you find that issue in favor of the plaintiff, he will be entitled to your verdict for whatever may appear to be due under the explanations I have given to you.)' * * *

To this charge and the answers to their point the defendants excepted, and on verdict and judgment for the plaintiff, they took this writ, assigning for error:

1. The answer to the defendants' point.¹
2. The part of the charge in ().²
3. The part of the charge in ().³
4. The part of the charge in ().⁴
5. The admission of plaintiff's offer.⁵

EDWARD HARVEY and JOHN D. STILES, of John D. Stiles & Son, (LEVI SMYER with them,) for the plaintiffs in error.

R. E. WRIGHT, of R. E. Wright's Sons, (C. J. ERDMAN with them,) for defendants in error.

Opinion, Mr. Justice GREEN.

We think the learned court below was in error in their interpretation of the clause of the contract which subjected its obligatory force to the will of the grantees. The language of this portion of the agreement is certainly inartistic and, indeed, uncouth, but it is not unintelligible. It is practically conceded in the charge that "Krum and Peters had a right to give up the lease if they in good faith believed it could not be made to pay." We agree with this, but as we understand the charge, this is not the question upon which the case was given to the jury. On the contrary, the court said: "I say to you that when this lease was given up in June, 1884, if it is proved that at that time, by ordinary diligence and ordinary business enterprise and capacity it might have been made to pay a profit, Mr. Mersher may recover, because there is implied in this agreement a covenant or understanding that

they shall work it in an ordinary workmanlike manner." And again: "If the plaintiff has satisfied you that the quarry, when the lease was given up, was of such a kind and the material was of such a quality, and the quarry itself was of such a character as to be workable with profit, the plaintiff can recover. * * * If you consider all the evidence on that question and you are convinced that the quarry could have been worked with profit at the time it was given up, the plaintiff can recover." The same idea was repeated at the close of the charge where it was characterized as the main question.

According to this view of the defendants' obligation, it did not depend in any degree upon their own estimation or belief as to their ability to work the quarry at a profit, nor even upon the actual results of the best and most faithful efforts they could put forth with whatever capital or facilities they possessed. Instead of that the crucial test of liability as stated to the jury was the *possibility* of the quarry being worked at a profit with ordinary diligence by anybody or by any means. That, of course, is a mere question of opinion to be proven by witnesses who would testify as to their belief on the subject and who might thus induce a jury to find according to their belief as to what could be done with the quarry. Such opinions as this are easily obtained from willing friends of the interested parties, as unhappily is the case in too many other kinds of cases. They cost nothing to the witness. He does not go through the hazardous ordeal of actually conducting at his own expense the practical operations concerning which he testifies. He ventures nothing but an opinion and in that he assumes no risk. Upon reading the testimony in this case we find it was tried upon this principle precisely. Witnesses were examined on behalf of the plaintiff to prove that the quarry could be worked at a profit and they gave their opinions to that effect. It was proved most clearly for the defense that in point of fact no profit was made, but on the contrary a heavy loss, and there was no proof in the case that in reality any profit was made, yet the jury were instructed that if they found that the quarry could be worked at a profit the plaintiff was entitled to recover. But the agreement provided for a very different standard of liability. The language is, "should the quarry prove a failure, that no proceeds should be in hands

of the second party, or that they would abandon the quarry, believing that the quarry would not be a paying one or a profitable one to them in their estimation, and if the quarry had not netted any clear profit to the second party at abandoning said quarry, then the second party shall not be responsible for any further payment, and this agreement shall be null and void and of no effect." All this verbiage simply means that if Krum and Peters made no profit and believed that the quarry was not a profitable one to work they could abandon the quarry and the contract was a nullity. In other words, the test of their right to terminate the contract was the fact that they had made no profit, and their belief that the quarry was not a profitable one to work. It was conceded they had made no profit, and the proof was most ample that they believed the quarry to be an unprofitable one to work, and they did actually abandon it and surrendered the lease. Now, according to the terms of their contract, they were entitled to have their liability tried by these tests. Did they make no profit and did they really believe the quarry an unprofitable one? If so, they were not liable and there could be no recovery. They had an undoubted right to contract in that way if the other party were willing, as he certainly was. The books abound with authorities which prove this, but a simple reference is sufficient: *Singerly v. Thayer*, 108 Penn. St. 291. In a contract for an elevator the words were, "Warranted satisfactory in every respect." The court below charged the jury that if they were of the opinion that the elevator was reasonably fit for the purpose for which it was intended, and the defendant ought to have been satisfied with it, the verdict might be for the plaintiff. We held that this was error. The fair inference from the contract was that the elevator was to be satisfactory to the defendant, and while it could not be rejected for mere caprice, yet a *bona fide* objection by him to its working was a sufficient defense. The present chief justice said, speaking of the charge of the court below: "In other words, it may have been wholly unsatisfactory to him, yet if the jury thought he ought to have been satisfied, he was bound to accept it. In effect, that is, it need not have operated to his satisfaction in any respect, but to the satisfaction of the jury which might be called to pass on the rights of the parties. * * * He did

not agree to accept what might be satisfactory to others, but what was satisfactory to himself. This was a fact which the contract gave him a right to decide. He was the person negotiating for its purchase. He was the person who was to test it and to use it. No other persons could intelligently determine whether in every respect he was satisfied therewith." The foregoing reasoning applies with a still greater force to the present case. Krum & Peters were the persons who were to work the quarry. It was they who were to pay all the expenses and incur all the risk. This they must do in any event, and hence they would be most anxious to provide for a means of extrication from what might prove to be a ruinous loss. For that very reason they stipulated for an absolute privilege to terminate the contract if they made no profit and believed the quarry unprofitable to work. They did not choose to be subject to the opinions of others in this most important matter, and in this they were wise. Doubtless they knew, as nearly all men in the business world do, that the making of profits—on paper—is an affair of the simplest and easiest character. Thousands of men of good business capacity are being constantly led on to loss, and great numbers to ruin, by the seductive array of profits, on paper, which are never realized. Against the possibility of having their obligation to continue a losing contract, to depend upon the easily obtained and loosely formed opinions of strangers, they took care to provide by their agreement, and they are now entitled to the protection for which they bargained. Of course they could not from mere caprice and without reason say they were losing, and thus terminate the contract. But that is a very different matter from being obliged to submit to the mere opinion of strangers, whether witnesses or jurors, on the question of a possible profit in conducting their operations. These views sustain the second, third and fourth assignments of error.

We also sustain the fifth, as we do not see the relevancy of the testimony there offered and admitted, and we are unable to discover any evidence of bad faith on the part of the defendants.

Judgment reversed.

MUHLENBERG V. HENNING ET AL.

(116 Pennsylvania State, 138. Supreme Court, 1887.)

Mutual mistake. Where a contract is entered into upon an assumption by the parties of the existence of a certain fact, as to which it afterward appears that the parties were mutually mistaken, the contract obligation ceases.

Plea of exhausted mine or mineral non-existent. In a five year ore lease, the lessees covenanted to pay 35 cents per ton for every ton of merchantable ore mined, and to mine at least 1,500 tons annually during the term, or in default thereof to pay a royalty of \$525 annually, and that the lease should be forfeited at the option of the lessors, if at the end of each year at least \$525 as rent or royalty had not been paid. In an action of covenant to recover unpaid royalties for two years under the default rate, an affidavit of defense was filed, averring that though the defendants had operated the mines in a workmanlike and skillful manner for about nine months, yet on account of the non-existence of sufficient ore and its inferior and unmerchantable quality, they were unable to continue: *Held*, that the affidavit exhibited a good defense to the action.

Error to Common Pleas, Berks County.

Covenant by Henry A. Muhlenberg and Hiester H. Muhlenberg against John Henning and James H. Maderia, to recover two years' royalty, under the provisions of a certain lease.

The plaintiffs having filed a copy of the lease, and an averment of the amount due thereunder, defendants filed an affidavit and a supplemental affidavit of defense, the allegations of which are stated in the opinion. Plaintiffs then took a rule for judgment for want of a sufficient affidavit of defense, which the court (HAGENMAN, P. J.,) subsequently discharged, whereupon plaintiffs took this writ.

G. A. ENDLICH and H. A. MUHLENBERG, for plaintiffs in error.

No allegation in the affidavit can prevent judgment if the defendant could not, upon the trial, be permitted to produce

¹ *Verzan v. McGregor*, 2 M. R. 565; *Harlan v. Lehigh Co.*, 8 M. R. 497.

proof of the matters alleged: *Leonard v. Fuller*, 1 Penny. 387; *Heaton v. Horton*, 35 Leg. Int. 146; *Tatman v. Been*, 1 Wkly. Notes Cas. 107; *West Harrisburg Assn. v. Morgenthal*, 2 Pears. 343. None of the matters alleged in these affidavits would be admissible: *Johnston v. Cowan*, 59 Pa. St. 275; *Harlan v. Coal Co.*, 35 Pa. St. 287; *Eshelman v. Thompson*, 62 Pa. St. 495. The royalty is recoverable, though no ore at all is found, there being no warranty: *Jefferys v. Fairs*, 4 Ch. Div. 448; *Jowett v. Spencer*, 1 Exch. 647; *Jervis v. Tomkinson*, 1 Hurl. & N. 195; *Bute v. Thompson*, 13 Mees. & W. 487; *Harlan v. Coal Co.*, *supra*. Where a sum certain is reserved, it is recoverable, although no ore at all is found worth working: *Ridgway v. Sneyd*, Kay, 627. The subsequent parol modification can not have the effect claimed for it by defendants: 2 Whart. Ev., § 1025; *Stowell v. Robinson*, 3 Bing. N. C. 928; *Marshall v. Lynn*, 6 Mees. & W. 109; *Tyers v. Iron Co.*, L. R. 10 Exch. 195; *Wiser v. Allen*, 92 Pa. St. 317; *Wilgus v. Whitehead*, 89 Pa. St. 131; *Kemble Iron Co. v. Scott*, 90 Pa. St. 332, 344; *Taylor v. Winters*, 6 Phila. 126; *Megargee v. Railroad Co.*, 2 Wkly. Notes Cas. 535.

ERMENTROUT & RUHL and HENRY C. G. REBER, for defendants in error.

No court has ever held that royalties could be recovered where no ore existed on the demised premises. The cases cited by plaintiff are all where no ore was found thereon: *Clifford v. Watts*, 18 Wkly. Rep. 925; *Kemble Iron Co. v. Scott*, 90 Pa. St. 344. Relief is granted where there is an innocent mistake on both sides as freely as in cases of a fraudulent concealment or suppression of facts: *Kerr, Fraud & M.*, 416; *Mays v. Dwight*, 82 Pa. St. 464; *Hoover v. Sensman*, 4 Atl. Rep. 730.

Opinion by Mr. Justice CLARK.

This action of covenant was brought upon a contract, under seal, denominated a lease, and dated 28th July, 1883, by the terms of which the lessors granted to the lessees the exclusive

right for five years, to all the iron ore contained in a certain tract of fifty acres of land therein described; in consideration whereof the lessees agreed to pay to the lessors, for every ton "of clean merchantable ore raised, mined and taken away by them or their order from the said premises, the price of thirty-five cents," etc. The lessees further agreed "to raise, mine, carry away and sell at least fifteen hundred tons of iron ore, annually, during the continuance of this lease, or in default thereof, to pay a royalty of \$525, annually;" the lease to be forfeited at the option of the lessors if, at the end of any year, \$525, as rent or royalty, had not been paid during the year.

It appears by the several affidavits of defense that the lessees, after the execution of the lease, promptly entered into the possession, and at an expense of \$3,000 erected all the machinery and appliances necessary for the proper prosecution of the work; that they were fully equipped to mine, dig and wash all the iron ore upon the tract; that with the aid of practical miners of large experience they prosecuted their undertaking with due diligence for nine months or more in a workmanlike and skillful manner, but, after a full exploration and search, they failed to find sufficient ore to enable them to carry on and continue the operation as was contemplated in their contract; and further, that the ore which they did find and which the said tract contained, was of such inferior quality that, when properly and carefully mined, washed and prepared for market in the usual manner, it was not "merchantable iron ore;" that the lessees communicated these facts to the lessors, and the operation of the mines was thereupon discontinued, but the machinery was suffered to remain with the verbal understanding between the parties that, as long as the mine was not operated for the reasons stated, the royalty would not be required. On the 1st April, 1886, this suit was brought to recover two years' royalty with the interest thereon. The question for our consideration is whether or not the affidavits exhibit a good defense to the whole or any part of the plaintiff's claim.

The lessees were without doubt bound to prosecute the work without delay. It was their duty to search for and find the ore, and to ascertain its quality; and if ore in sufficient quantity

and of proper quality could be found they were held to raise fifteen hundred tons of it annually; failing in either, they were bound for the minimum stipulated royalty at \$525 per year: *Johnston v. Cowan*, 59 Pa. St. 275.

If, however, it was established by actual and exhaustive search that, at the time of the contract, there was in fact no ore in the land, or no ore of the kind contracted for, it can not be pretended, upon any fair or reasonable construction of the contract, that the lessees were nevertheless bound for the "royalty" of \$525 annually; for the payment of the royalty was undoubtedly based upon the assumption of the parties that ore, ore of the quality specified, existed there. The subject of sale, it is true, is the exclusive right to mine the iron ore, but for that right the lessors were to be compensated according to the number of tons of "clean and merchantable iron ore" mined, the lessees undertaking to mine fifteen hundred tons annually, "or in default thereof" to pay \$525 royalty. And how could the lessees be in default in mining fifteen hundred tons annually if there was no ore to mine? We are not to construe the contract to require the lessees to perform an impossible thing. The \$525 is not a penalty, it is the price of the ore. The grant was of the ore in place, and, if the subject-matter of the contract fail, the price is not payable. If there was no ore to mine there could be no royalty to pay. As well might the vender of meat which proved to be putrid, or of a cargo of corn which had no existence, enforce collection from his vendee. We think the manifest meaning or intention of the parties, as exhibited by the terms of the contract, was that fifteen hundred tons "of clean and merchantable iron ore" were to be mined in each year if that quality and quantity of ore were there found, and that the contract by necessary implication must be so construed.

There was no guarantee, it is true, on part of the lessors, that any ore was to be found in the land or that the operation would be profitable to the lessees, who certainly entered upon the enterprise at their own risk; the lessees, therefore, could have no recourse upon the lessors for their outlay in the event of failure: *Harlan v. Lehigh Coal Co.*, 35 Pa. St. 287. On the other hand, if the latter were to bring an action against the former upon a covenant to work the mine, equity would

interfere to prevent a recovery: *Ridgway v. Sneyd*, 1 Kay, 627. But the contract having been made upon the assumption of the parties that ore of the quality mentioned existed in the land, when it became manifest that the parties were mutually mistaken, the contract obligation ceases. It may turn out at the trial, of course, that the ore was in fact merchantable, but, as the case is now presented, we must assume the facts as stated in the affidavits of defense.

This view of the case accords with and is fully sustained by the ruling of this court in *Kemble Co. v. Scott*, 15 W. N. C. 220. In that case Scott granted to the company "the exclusive right to dig and take away the iron ore in a certain tract of land, the company covenanting to pay at the rate of fifty cents per ton of ore mined," etc.; and further, that for any period of three years, after the first year, the rent, in the aggregate, should not be less than \$10,000, whether ore to that extent was mined or not. At the end of four years Scott brought suit and recovered a judgment for \$10,000 rent accrued in the three preceding years, and at the expiration of three years more brought a second suit to recover \$10,000, the alleged minimum rent for that term, and it was held competent for the company to prove, by way of defense, that the ore contained in the leased premises was insufficient in quantity to produce the amount of rent or royalty claimed by the plaintiff.

The authorities cited by the plaintiff in error are inapplicable to the case under consideration. In *Jefferys v. Fairs*, L. R. 4 Ch. Div. 448, the lease was of a vein or seam of coal, with the overlying and underlying beds of clay, under a farm called Llwyndu, at £100 per annum "on a certain or dead rent," and royalties of 9d. per ton for the coal, and 4d. for the clay, the coal being necessary for working the clay with advantage. It was held that it was in consideration of the dead rent reserved the lessees obtained license to enter and search for the vein, and that the lessors were, therefore, entitled to an order for the payment of the dead rent.

In *Jowett v. Spencer*, 1 Exch. 647, the covenant was to pay £40 for every statute acre of coal which should be found within certain premises, and until the said price or consideration should be fully paid, to pay £40 per annum, whether the

whole of an acre of the said coal should in any such year be gotten or not. The sole question under the pleadings was, whether the finding of the coal was a condition precedent to the plaintiff recovering the annual sum of £40; and it was decided that it was not, as the defendant was the proper party to find and ascertain the quantity of the coal. In *Jervis v. Thomkinson*, 1 H. & N. 195, the lessees entered into the covenant knowing the exact state of the mine, and, with that in view, covenanted positively and absolutely to get the quantity of 2,000 tons of salt in every year, or pay for the deficiency at the end of it, and, therefore, whether they could be got easily or with difficulty, or even whether they existed at all, was held to be immaterial in the case of an absolute and unqualified covenant.

In the *Marquis of Bute v. Thompson*, 13 M. & W. 486, the plain intentions of the parties, as manifested on the face of the contract, was that the rent stipulated should be paid whether there was coal or not; there was an express provision in the alternative to pay the rent. See *Clifford v. Watts*, 18 W. R. 925.

We are clear in our conviction that the affidavits of defence in this case are such as should send the case to a jury.

Writ of error dismissed at the cost of the plaintiffs without prejudice, etc.

GIBBEN ET AL. V. ATKINSON.

(31 North West Rep. 570. Supreme Court of Michigan. 1887.)

¹ Where no ore found, no royalty due. A lease "for the purpose of exploring for, mining, taking out and removing the merchantable ore which is or which hereafter may be found on, in or under said land," reserving surface use to the lessor, is a lease for mining iron ore. And if, after diligent search, no ore is found, the lessees can not be held for royalty—notwithstanding a covenant to take out a fixed quantity.

A mining lease provided for payment of taxes by the lessee; no ore was found and no royalty accrued. Held, nevertheless, that the lessee was bound to pay the taxes while he occupied the land prospecting for ore, and until surrender of his lease under the option clause.

¹ *Jones v. Shears*, 8 M. R. 333.

Error to Circuit Court, Marquette County.

W. P. HEALY, for plaintiff in error.

E. J. MAPES, for defendants in error.

MORSE, J.

On the first day of August, A. D. 1881, the plaintiffs executed to the defendant a mining lease of the S. E. $\frac{1}{4}$ of section 28, township 47 N. range 28 W., in the county of Marquette. The lease provided that the premises were leased "for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable shipping iron ore which is or which hereafter may be found on, in or under said land."

"The party of the second part shall have the right at any time to terminate this lease by giving said first party three months' notice in writing, personally or by mail, and thereupon this lease shall terminate, and all arrearages and sums which may be due hereunder up to its termination shall be paid in full by said second party to said first party." The second party was authorized to erect buildings and machinery on the premises, which became real estate; but at the termination of the lease, if arrearages were paid, such buildings and machinery could be removed by second party within sixty days. He had the right also to cut timber for fuel for mining purposes, and all other purposes connected therewith. He was to pay a royalty of fifty cents per ton of 2,240 pounds on all iron ore removed from said premises during the lease.

"Fifth. Payments of such royalty shall be made quarterly, on or before the fifteenth day of November, February, May and August, for the iron ore removed from said premises during the three calendar months immediately preceding, to such person or party as the parties of the first part, their heirs, executors, administrators or assigns, may designate."

"Eighth. The said party of the second part shall, on or before January 1st following the levy thereof, pay all taxes and assessments, ordinary or extraordinary, general or specific, which may be assessed on said lands, iron ore, or improvements on said lands, and furnish at time of payment, duplicate receipts thereof to said first parties."

"Ninth. Said second party shall mine and remove at least five thousand (5,000) gross tons within one year from the first day of August, A. D. 1881, and shall mine and remove at least eight

thousand (8,000) gross tons the second year—that is, between the first day of August, A. D. 1882, and the first day of August, A. D. 1883—and ten thousand (10,000) gross tons each and every year thereafter during the continuance of this lease, or in case such quantities are not mined and removed, the said party of the second part, his executors or assigns, shall, nevertheless, pay royalty upon said minimum amount, to be paid *pro rata* quarter-yearly, as aforesaid; but ore paid for in any one year and not mined, may be credited on any excess of said minimum amount mined and paid for in the year next succeeding, but not thereafter. Said second party further agrees to diligently and continuously prosecute mining operations on said lands during the existence of this lease, and to mine and remove as great a quantity of iron ore in each and every year in excess of said minimum amount as can be profitably mined and removed.”

“Twelfth. The right of possession of said lands not occupied for mining purposes by said second party shall always remain in said first parties, their heirs or assigns, who shall have the same right to use and occupy said lands as if these presents were not executed, whenever the same does not evidently or manifestly interfere with the mining operations of said second party.”

The term of the lease was for twenty years from and after its date.

We have set forth above those portions of the lease necessary in the determination of this controversy. The plaintiffs in this action sued the defendant upon a special count in assumpsit for the rent or royalty from the date of the lease to December 18, 1882; and under the common counts for the taxes upon the premises which the defendant failed to pay, and which plaintiffs were obliged to pay to save said premises from sale. Upon the trial in the court below the plaintiffs introduced evidence tending to show that the defendant accepted the lease and entered into possession of the lands at its date, and began at once to search and explore for iron ore, and continued in possession until about the first day of June, 1882. The defendant then ceased exploring, claiming that he had made diligent search for iron ore but was unable to find any, and he refused to pay any rent, royalty or taxes whatsoever; but he did not surrender the lease, neither was the same forfeited by the plaintiffs until the eleventh day of December, 1882.

Plaintiffs also showed the amount of the taxes for the year 1881 upon the premises which defendant refused to pay and which they paid, to be \$160. They further testified that the amount due them for royalty, under the ninth clause of said lease, was \$2,000.

The defendant, to maintain the issue on his part, introduced evidence tending to show that, after receiving said lease from plaintiffs, he immediately entered on said lands and commenced exploring for iron ore, and in the course of one year expended the sum of \$14,000 cash in such explorations, but was unable to find any merchantable iron ore, or any iron ore having any value, on said lands; and that so far as he could discover no mine or mines of iron ore existed on said lands, and that he had removed no iron ore whatever from said lands, for the reason that he could not discover any iron ore on said lands.

The defendant also introduced the testimony of skilled miners who had examined said land since the commencement of this action, and they testified that in their opinion the said defendant had expended as much money on said lands in exploring for iron ore as was necessary, and that in their opinion no mine of iron ore exists on said land.

The circuit judge instructed the jury that the lease was intended by the parties to be a lease of this land for the purpose of mining merchantable iron ore, and that it was in the contemplation of the parties that there was such merchantable iron ore in paying quantities upon the property in question. "The defense, in order to avoid the payment of fifty cents per ton upon eight thousand tons provided for in the second year, must prove to you that there was not merchantable iron ore upon that property in sufficient quantities to make it pay; in other words, he must prove to you that there was not a mine of that description upon the property in question." "I think I have said—if I have not I will say now—that the defendant in this case was bound under the terms of this lease to go on and work upon that property and conduct the explorations—to use endeavors to find what is there—in the usual customary mining manner. He was bound to do all that good mining would require in order to obtain the results contemplated by the lease. If he has done so and no good ore was found by virtue of such exertions, then the plaintiff in this case could not recover, that is, on that branch of the case." He also instructed them that the defendant was liable for the taxes.

The jury found for the defendant on the royalty, but gave a verdict for the plaintiffs for the taxes, assessing their damages at \$168.41.

Two bills of exceptions were settled in the cause, and both parties come to this court on writs of error. The plaintiffs claim they are entitled to the royalty as a matter of law, and the defendant contends that the court erred as to the taxes.

We think the court was right in both instances. We consider the lease clearly one by its terms for mining iron ore. The plaintiffs, by the twelfth section of the lease, expressly reserved to themselves the use and possession of the land for every other purpose; and the right to cut timber on the land was also expressly restricted to such timber as might be wanted for mining purposes. Being such a lease, if, upon diligent search and exploration, no iron ore was found, and none exists in or under the soil, the defendant can not be held liable for the royalty upon such ore: *Cook v. Andrews*, 36 Ohio St. 174; *Brick Co. v. Pond*, 38 Ohio St. 65; *Reed v. Beck* (Iowa), 23 N. W. Rep. 159.

But the tax clause of the lease stands upon a different basis. The taxes he agreed to pay were not those that might be assessed or levied upon the iron ore alone, but upon the whole property—the land and improvements thereon as well as the ore. Having retained possession of the lands while exploring and until December, 1882, we think the defendant was liable for the taxes of 1881. It is also equitable that he should pay them. While he was in possession no other person could test the lands for iron ore, and he was authorized to cut and probably used timber belonging to plaintiffs for fuel, and in the erection of machinery upon the premises. He can not complain that he should pay the taxes upon his own improvements upon the premises, which were made by the contract part of the real estate, but which he could remove, or upon the lands which he had the privilege of testing for ore, without any other payment for rent or royalty if he failed to find ore.

The judgment is affirmed with costs.

The other Justices concurred.

1. Exhaust, no defense to covenant for minimum rent: *Bamford v. Lehigh Co.*, 33 Fed. 12.

2. But there may be, in cases, relief in equity: *Smith v. Morris*, 8 M. R. 317.

McCORMICK, Administrator, v. ROSSI.

(70 California, 474. Supreme Court, 1886.)

¹Forfeiture to vendor not enforced in equity. The failure of the vendee under a contract for the sale of land to pay the purchase price within the time stipulated, or to perform other conditions of the contract, is no ground for a decree in equity declaring a forfeiture of his rights. A court of equity will never enforce a penalty or forfeiture.

Appeal from Superior Court, Placer County. The facts are stated in the opinion.

HALE & CRAIG and L. W. SPEAR, for appellant.

J. E. PREWETT, for respondent

BELCHER, C. C.

This is an action upon a contract made by the plaintiff's intestate for the sale of a mining claim, to the defendant, for the sum of \$6,500. It is alleged in the complaint that the defendant had paid only \$1,300 of the agreed purchase price; that he had failed to work the mine as required by the contract; that the full amount of the purchase money had become due, and that in consequence of his failure to pay the same he had by the terms of the contract forfeited all his rights thereunder. The prayer is that it be "decreed that defendant has committed a breach of said contract, and has forfeited all his rights thereunder and to the possession of said property." The defendant in his answer alleged that he had paid \$1,504.50 of the purchase money; and he denied that by not paying the balance thereof or otherwise he had failed to comply with the terms of the contract, or had forfeited all or any of his rights under it. Judgment was entered declaring forfeited all the defendant's rights under the contract, and ordering the possession of the property to be restored to the plaintiff; and the defendant appealed. In *Keller v. Lewis*, 53 Cal. 118, the court said: "It is a universal rule in equity never to enforce

¹ *Cross v. McClenahan*, 12 M. R. 669; *Funk v. Haldeman*, 7 M. R. 203; *Chicago Co. v. U. S. Co.*, 12 M. R. 570.

either a penalty or forfeiture: 2 Story, Eq. Jur., § 1319, and cases cited. On the contrary, equity frequently interposes to prevent the enforcement of a forfeiture at law." Judgment declaring a forfeiture had been entered in that case, and was reversed. This case is in all essential particulars like that, and the judgment here should also be reversed and the cause remanded, with leave to the plaintiff to amend his complaint if so advised.

SEARLS and FOOTE, CC., concurred.

BY THE COURT.

For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with leave to the plaintiff to amend his complaint if so advised.

1. District rules will not be construed to work forfeiture if such construction can be avoided: *Rush v. French*, 1 Ariz. 93.

SOUTHERN DEVELOPMENT COMPANY V. SILVA.

(125 U. S. 247. Supreme Court, 1888.)

Rule where the answer denies all equities. The general rule that when the answer of the defendant in a cause in equity is direct, positive and unequivocal in its denial of the allegations in the bill, and an answer on oath is not waived, the complainant will not be entitled to a decree unless these denials are disproved by evidence of greater weight than the testimony of one witness, or by that of one witness with corroborating circumstances, applies when the equity of the complainant's bill is the allegation of fraud.

Essential elements of remediable misrepresentations. In order to rescind a contract for the purchase of real estate on the ground of fraudulent representation of the seller, it must be established by clear and decisive proof that the alleged representation was made in regard to a material fact; that it was false; that the maker knew it was not true; that he made it in order to have it acted on by the other party; and that it was so acted upon by the other party to his damage, and in ignorance of its falsity, and with a reasonable belief that it was true.

¹**Opinion as to ore in sight.** Statements made by the seller of a speculative property, like a mine, at the time of the contract of sale, concerning his opinion or judgment as to the probable amount of mineral which it contains, or as to the character of the bottom of the ore chamber, or as to the value of the mine, if they turn out to be untrue, are not necessarily such fraudulent representations as will authorize a court of equity to rescind the contract of sale.

No presumption that false statement was knowingly made. The fact that a representation made by a seller was false raises no presumption that he knew that it was false.

Vendee examining for himself. When the purchaser of a property undertakes to make investigations of his own respecting it before concluding the contract of purchase, and the vendor does nothing to prevent his investigation from being as full as he chooses, the purchaser can not afterward allege that the vendor made representations respecting the subject investigated which were false.

Appeal from the Circuit Court of the United States for the Northern District of California.

In Equity. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion of the court.

WM. M. STEWART, A. T. BRITTON and A. B. BROWNE, for appellant.

¹ *Rendell v. Scott*, 70 Cal. 514.

JOHN H. MILLER and J. P. LANGHORNE, for appellee.

LAMAR, J.

This is a bill in equity to rescind a contract of purchase of a silver mine on the ground of fraudulent representations, and to recover the consideration paid. The suit was commenced originally in the Superior Court of Inyo county, Cal., on the 8th of May, 1884; but on account of the diverse citizenship of the parties, the plaintiff being a corporation organized under the laws of Nevada, and the defendant a citizen of California, it was removed into the United States Circuit Court. Demurrers to the original bill and to an amended bill having been sustained, the present "second amended" bill of complaint was filed. Answer was filed by defendant, replication by complainant, and issue was joined. Testimony was taken and the case was heard, resulting in a decree dismissing the bill on the 14th of March, 1887. It appears from the record that on the 15th of March, 1884, the appellant (who was the complainant below) purchased from the defendant a mining claim, known as the "Sterling Mine," together with other mining property, all situated in Inyo county, Cal., paying him therefor the sum of \$10,000. On the 8th of May, 1884, the original bill of complaint was filed, charging, in substance, that complainant was induced to purchase said mine and mining property solely upon the representations made by Silva as to its condition, extent, and value; that such representations were made to H. M. Yerington, the president of said complainant company, and to one Forman, a mining expert in his employ, in January, 1884, when an examination of said mine was made by them; that said representations were false and fraudulent, and were well known to the defendant at the time to be such; and that said representations were, in substance and in a somewhat different order, as follows: (1) That there were 2,000 tons of ore in the mine; (2) that the bottom of what is called the "Ore Chamber" was solid ore, as good as the ore exposed on the sides of the chamber; (3) that there were not less than 500 tons of ore in and about the said ore chamber; (4) that the mine was worth \$15,000; and (5) that, after going through the mine, the defendant represented to said Yerington and

Forman that he had shown them all the work which had been done in or about the mine that would throw any light upon the quantity of ore therein.

The answer of the defendant is direct, positive, and unequivocal in its denials of the allegations of the bill; and, as an answer on oath is not waived, unless these denials are disproved by evidence of greater weight than the testimony of one witness, or by that of one witness with corroborating circumstances, the complainant will not be entitled to a decree; and this effect of the defendant's answer is not weakened by the fact that the equity of the complainant's bill is the allegation of fraud: *Vigel v. Hopp*, 104 U. S. 441; Story, Eq. Jur., § 1528; Daniell, Ch. Pr., 845. The burden of proof is on the complainant; and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations. In order to establish a charge of this character the complainant must show, by clear and decisive proof—*first*, that the defendant has made a representation in regard to a material *fact*; *secondly*, that such representation is false; *thirdly*, that such representation was not actually believed by the defendant, on reasonable grounds, to be true; *fourthly*, that it was made with intent that it should be acted on; *fifthly*, that it was acted on by complainant to his damage; and, *sixthly*, that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true. The first of the foregoing requisites excludes such statements as consist merely in an expression of opinion or judgment, honestly entertained; and, again, (excepting in peculiar cases,) it excludes statements by the owner and vendor of property in respect to its value.

The evidence in the case shows that in the development of this mine a tunnel, called the "Sterling Tunnel," had first been dug. At a distance of about 140 feet along the line of this tunnel, from its mouth, there are branches running easterly and westerly. About 60 feet from the main tunnel, in the eastern branch, winze No. 1 starts down. About 38 feet below the level of the tunnel, a level, known as the "38-feet level," starts off from this winze; and at the bottom of the winze, a distance of about 82 feet vertical below the main tun-

nel, there is another level, known as "82-foot level." In the easterly branch of the tunnel, about 30 feet from winze No. 1, there is another winze starting downward, inclining to the southeast as it goes down. This winze is numbered 2, and is connected with the 38-foot and the 62-foot levels. Intermediate between these levels is another level, known as the "55-foot level," which opens out to the eastward of winze No. 2 into a chamber about 15 feet long and about 8 feet wide. In the southeast corner of this chamber was a little hole or shaft, extending downward a few feet only. In sinking winze No. 2, Silva struck an ore body at a point opposite the 38-foot level. It was irregular in shape, dipping at an angle of about 45 degrees. Commencing at a point, comparatively speaking, it increased gradually as it descended, and was in form somewhat like a pyramid. At its base it measured four or five feet across, and it was about nine feet long. The surface of this inclined pyramid formed the floor or bottom of the chamber. There was, however, a small space between the base and the opposite foot-wall, which is called the "bottom" of the chamber by complainant's witnesses, and is the "bottom" spoken of in the bill. The ore comprising this pyramid was carbonate, and, being friable, had slacked down over the face of the pyramid to the bottom, partially covering it, and partially filling up the little hole or shaft in the southeast corner.

As to the first alleged representation, as classified above, viz., that there were 2,000 tons of ore in sight in the mine, and that Yerington relied upon such statement when he made the purchase, the proof utterly fails to establish either that Silva made the statement, as a statement of fact, or that Yerington relied upon such statement, even had it been made. Silva, both in his answer and in his testimony, denies ever having made the statement, and the testimony of Yerington himself is to the effect that Silva's statement was qualified by the phrase "in his judgment." This, then, is shown to have been nothing more than an expression of opinion on the part of Silva as to the quantity of ore in sight in the mine. But, even if Silva had made the statement imputed to him in the bill, there is abundant evidence to show that Yerington did not rely upon it in the purchase of the mine. Yerington's own evidence, on this point, is against him. He testifies that

he did not believe that there were more than 1,000 tons of ore in the mine, and that Forman agreed with him on that point. And he further testifies that, valuing this ore at 32 ounces of ore and 45 per cent. of lead per ton, (which it appears was its approximate value, as determined by several assays,) and calculating that there would be 1,000 tons of ore there, the mine would be worth \$10,000—the sum he actually gave for it. This lacks much of coming up to the rule that the complainant must have been deceived, and deceived by the person of whom he complains: *Attwood v. Small*, 6 Clark & F. 232; *Pasley v. Freeman*, 3 Term R. 57. Besides, the quantity of ore “in sight” in a mine, as that term is understood among the miners, is at best a mere matter of opinion. It can not be calculated with mathematical, or even with approximate, certainty. The opinions of expert miners, on a question of this kind, might reasonably differ quite materially. In the case of *Tuck v. Downing*, 76 Ill. 71, 94, the court say: “No man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blow-out, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. ‘The sight’ determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of the thing, utterly speculative, and every one knows the business is of the most fluctuating and hazardous character. How many mines have not sustained the hopes created by their outcrop!” We approve the position of the court below, that “Yerington and his expert, Forman, were as competent to judge how much ore there was ‘in sight’ as Silva was. They were no novices in matters of that kind. This misrepresentation, if such it be, does not contain either the first, fourth or fifth element stated by Pomeroy as essential elements in a fraudulent misrepresentation.”

As stated above, the substance of the allegation of the bill is that Silva represented that the bottom of this ore chamber, which was covered with loose ore slacked down from the pyramid, was composed of ore as good as that exposed on the sides of the chamber. Silva, in his answer, expressly denies

ever having made such statement. Forman testifies that with a little prospecting pick he had with him he raked through the dirt and loose ore that had slacked down, to see if it would reach the bottom of the ore chamber, but that it would not. He further says: "I asked Silva how the bottom was; if he had sunk below there. He said, 'No.' I said, 'How is the bottom? You, as a miner, know it is a suspicious thing to see a bottom covered up, or anything of that kind.' He said the bottom was as good or better than any ore which we saw in the chamber." Yerington at first testifies that Silva, in reply to a question by Forman, stated that this floor was solid ore; but he says that he does not think any comparison was made between that ore and the ore in the sides of the chamber, as narrated by Forman. On the next day, however, Yerington having, as he says, refreshed his memory,—“and I [he] had the means of doing it,”—was positive that the conversation between Silva and Forman at that time was as Forman afterward stated it. Silva, in addition to his positive denial in his answer, testifies that “there never was a word said about that. They asked me this: ‘What I thought of the ore body?’ and I said ‘I thought it would be extensive.’ I thought so at the time, and I think so yet.” The witness Eddy, who was present all the time in the ore chamber, except when he went to the thirty-eight feet level to get a pick, does not know anything about a conversation such as Yerington and Forman narrate. On this point, then, the testimony of Silva is directly to the contrary of that of Yerington and Forman. Certain other material facts in the case seem to indicate that there is just as strong probability that Silva’s statements in this matter are true as that those of Yerington and Forman are true. In the bill Yerington alleged, under oath, that Silva had discovered the fact that the bottom of the ore chamber was not composed of ore, and had afterward covered that bottom with ore, vein-rock, and matter—in other words, had “salted” the mine. There is no evidence in the record to prove this, or tending to prove it; on the contrary, the evidence of Yerington himself, and of the other witnesses who were examined on that point, is all to the effect that the ore covering the floor of the chamber had slacked down from natural causes in fine particles like wheat. Nor is there such

evidence to show that Silva knew the character of this floor, or of the extent of the ore vein, or deposits, (as it afterward turned out to be,) as would justify the interposition of a court of equity to set aside the contract on the ground of fraudulent representations. He had come onto the ore in excavating from the top. The sides of the ore chamber contained some ore of a good quality, and he had never demonstrated the extent and amount of ore in the pyramidal wedge in the side of the chamber. It is shown by the evidence of Yerington himself that, in the side of a drift running westerly from the ore chamber, there was ore which appeared to be continuous with the body of ore in the chamber; so that the statement Silva said he made, viz., that he thought the ore body would be extensive, at least appears reasonable. Upon all the facts and circumstances apparent of record, he might have made the statement he says he made, and believed he was telling the truth. For there is also some evidence to the effect that Silva had commenced to run a drift from the bottom of winze No. 1, for the purpose of striking and cutting the supposed downward extension of the ore body in the chamber; and this, before the examination of the mine by Yerington and Forman. After the sale of the mine, Coffin, the superintendent for the complainant company, when he commenced work in the mine, started in where Silva had left off in this drift, and carried it immediately beneath the ore chamber, entering the chamber by an up-raise. Then it was that the discovery was made that the ore body, instead of being a continuous ledge or lead, was merely a deposit. Furthermore, the testimony of Yerington and Forman, as regards the little hole or shaft in the southeast corner of the chamber, is directly opposed by the testimony of Silva and Eddy. Both Yerington and Forman testify that this little shaft was completely filled up with dirt and loose ore; while Silva and Eddy both testify that it was not so filled up, but that both Yerington and Forman stood in that shaft, and took samples of ore from it. It is thus seen that the evidence on this material point does not clearly establish the fraudulent representations of Silva as claimed by the complainant; but that, on the contrary, the material facts and circumstances as disclosed by the record are entirely compatible with the theory that Silva did

not make the representations charged against him, or, at most, that he merely gave expression to an opinion as to the extent of the ore body, erroneous though it proved to be. This would not constitute fraud. In the language of the court below: "This testimony was taken in June, 1866, about two and a half years after the conversations took place. They were present at the time, examining the mine, and engaged in conversation for an hour or more. These discrepancies in matters of detail during a long conversation, related by different parties, viewing the subject from different standpoints after the lapse of so long a period of time, are no more than might reasonably be expected, even in honest witnesses. There is no occasion to impute any intention to testify falsely to either. * * * Parties are extremely liable to misunderstand each other, and, in looking back upon the transaction in the light of subsequent developments, are prone to take the view most advantageous to themselves."

As to the third alleged representation, to wit, that there were not less than 500 tons of ore in and about that ore chamber, Silva, both in his answer and in his testimony, denies that he ever told Yerington and Forman, or anybody else, that there were 500 tons of ore there, or that there was any amount fixed or agreed upon by them as to the quantity of ore there; while the testimony of both Yerington and Forman is to the effect that Silva said, in his opinion, or in his judgment, there were 500 tons of ore in the chamber. So that, taking the strongest testimony produced on the part of complainant upon this point, it simply amounts to an expression of opinion on the part of Silva as to the amount of the ore in the chamber, and not a statement of fact. It therefore does not constitute fraud.

It is equally true that any statements that may have been made by Silva with reference to the value of the mine, can not, under the circumstances of this case, be considered an act of fraud on his part sufficient to warrant a court of equity in setting aside the contract herein. Yerington testifies that Silva said he had been asking \$15,000 for the mine, but that he would take \$12,500; while Forman says he does not recollect that Silva made any statement as to the value of the mine, but that he heard Silva say he thought it was worth

\$15,000. Such statements are not fraudulent in law, but are considered merely as trade talk, and mere matters of opinion, which is allowable: *Gordon v. Butler*, 105 U. S. 553; *Mooney v. Miller*, 102 Mass. 217. Moreover, it is clear, beyond question, that Yerington did not purchase the mine upon Silva's representations as to its value, as we shall hereafter see.

This disposes of all the alleged fraudulent representations, as arranged above, except the last, adversely to the complaint; and it is to this one that attention will now be directed. This charge is, substantially, that Silva represented to Yerington and Forman, when they visited the mine in January, 1884, and had gone through it, that he had shown them all the work which had been done in and about the mine that would throw any light on the quantity of ore therein. This representation is alleged to have been false and fraudulent, and well known by Silva to be such, because, at a cut a short distance from the mouth of the main tunnel, at a point known as the "point of location," a little hole or shaft had been sunk which had been filled up, and was not observable at the time of the examination of the mine in January, 1884, and also because there had been a number of drill-holes made in the sides of the ore chamber, and afterward filled up before the examination in January, 1884, so that they were not observable at that time; which holes clearly developed the fact that the ore about the chamber was nothing more than a shell, instead of a continuous body, as it appeared to the observer. The existence of the plugged-up drill-holes in the sides of the ore chamber is the worst feature of the case against Silva. They could not have been made by a former proprietor of the mine, as is slightly claimed in his behalf; for, as has been already shown in this opinion, Silva himself, or at least persons in his employ, had excavated that chamber after he had purchased it from one Edwards, in 1876. And certain it is that the drill-holes were found plugged up within a short time after he had sold the mine to the complainant company, March 15, 1884. The question is, did Silva know of their existence at the time he sold the mine, and, having such knowledge, did he falsely represent to the complainant that he knew nothing of them, thereby inducing complainant to act upon

such representations? Upon this question the evidence is somewhat conflicting. Yerington testifies that after going through the mine, he asked Silva if he had shown him the whole of the mine, and he replied that he had. And Forman testifies that Silva, in reply to a question from him, said that he had shown him all the work that had been done in and about the mine that would throw any light upon the quantity of ore in the mine, or the extent of the ledge or deposit. Silva admits that, in reply to a question by Yerington, he told him that he had shown him all the work that had been done in and about the mine, either by himself or under his direction. So that the question is narrowed down to simply this: Were said drill-holes in existence at the time Silva made such statement? If so, had they been made by him, or under his direction, or did he know of their existence? In his sworn answer Silva expressly "denies that he drilled any such hole or holes through the ore into the country rock or otherwise, or thereby or at all discovered the extent of said ore, or that he filled up said drill-holes, or concealed them from view, or kept them secret from complainant," etc.; and in his testimony he also denies having any knowledge of their existence. He says that he drilled no holes in the mine except what he had to do as a miner, and that he concealed nothing from Yerington when he showed him the mine. And again he says: "I showed Mr. Yerington all the work that was done in the mine that I knew anything of." There is no direct evidence going to show who drilled the holes; and there is nothing in the entire record to connect Silva with them, except the fact that he was the owner of the mine, and was in possession of it at a time when it is most likely they were drilled. But this circumstance alone should not outweigh the positive denial of Silva in his answer, and also his equally positive denial in his testimony, of his knowledge of the existence of said drilled holes. The law raises no presumption of knowledge of falsity from the single fact *per se* that the representation was false. There must be something further to establish the defendant's knowledge: *Barnett v. Stanton*, 2 Ala. 181; *McDonald v. Trafton*, 15 Me. 225. This rule is fortified by the consideration that had he known of the limited quantity of ore in and about the "ore chamber," Silva would hardly

have gone to the expense and labor of starting a drift from the bottom of winze No. 1, and constructing it for a certain distance, before the sale of the mine, for the purpose of reaching the supposed downward extension of the ore in and about that chamber. Knowing that the ore body terminated within a few inches of the surface of the chamber, and then, in the face of that knowledge, actually constructing a drift on the 82-foot level, at enormous expense, for the purpose of getting under that limited quantity of ore, would not appear a reasonable thing to do by any one, especially by such an experienced and practical miner as Silva is admitted to have been. The testimony, therefore, and all the other facts and circumstances of record, do not substantiate complainant's theory of the case on this point; in other words, there is not a satisfactory case of fraudulent representations on this point made out—not such a case as would justify the interposition of a court of equity to set aside the contract under consideration on the ground of fraudulent representations. As regards the little hole or shaft that had been sunk at the "point of location," and afterward filled up, so that it was not observable at the time of Yerington's visit in January, 1884, there is absolutely no testimony at all to show that Silva knew anything about its existence. He had done no work at that place, or very little at most, and was using the cut there as a sort of kitchen. The sides of the cut indicated that there was a ledge of ore there. It is admitted that Forman asked Silva why he did not "go down" on that ore, and that he replied that he considered the tunnel the best place to mine. Silva denies, both in his answer and in his testimony, that he ever knew that a shaft had been sunk at the point of location, and no one is found who can testify that he did know anything about it; on the contrary, the former owner of the mine, one Edwards, testifies that he himself dug that shaft and filled it up, prior to the time Silva purchased it, and that to his knowledge Silva did not know anything about that shaft.

It is essential that the defendant's representations should have been acted on by complainant, to his injury. Where the purchaser undertakes to make investigations of his own, and the vendor does nothing to prevent his investigation from being as full as he chooses to make it, the purchaser can not

afterward allege that the vendor made misrepresentations. *Atwood v. Small, supra*; *Jennings v. Broughton*, 5 De Gex, M. & G. 126; *Tuck v. Downing, supra*. The evidence abundantly shows that Yerington had been willing to give \$10,000 for the mine prior to the time he visited it and made his examination, in January, 1884. He had made inquiries of various persons for months previous to that visit. Several experts in his employ had visited the mine; had taken samples of ore from it; and it must have been from reports thus received that Yerington had made up his mind as to what the mine was worth. From the letters of an agent (Woods) to Eddy, the testimony of the witness Boland, the testimony of the witness Anthony, Eddy's testimony, and from the testimony of Silva himself, there can be no doubt that Yerington had offered \$10,000 for the mine several months before he had ever seen it; thus showing that his examination of the mine in January, 1884, merely went to corroborate the reports that he had received of it from his experts, Forman, Bliss; and that it was upon such reports, and his own judgment after an examination of the mine, that he made the purchase of it.

From all which it is clear to this court that the complainant has not proven his case, and the decree below is

Affirmed.

1. False representations not relied on constitute no ground of action: *Holdom v. Ayer*, 110 Ill. 448; *Ming v. Woolfolk*, 116 U. S. 599.
2. It is not essential that the party should know his representations to be false; it is enough that he did not know them to be true when the other party has relied on them and been misled: *Stimson v. Helps*, 10 Pac. 290.
3. The charge of fraud is not to be lightly made; all presumptions are against it: *Pierce v. Pierce*, 15 M. R. 675.
4. Fraudulent sale of land by "salting" with petroleum: *Chester v. Dickerson*, 52 Barb. 349.
5. An agent took transfer of stock to enable him to sell the mine it represented; he sold the mine but accounted for only part of the proceeds: *Held*, that an action would lie against him without demand for the return of stock: *Wooster v. Nevills*, 14 Pac. 390.
6. Delay to assert fraud weakens it as a defense: *Bamford v. Lehigh Zink Co.*, 33 Fed. 677.

¹ERHARDT V. BOARO ET AL.

(113 United States, 537. Supreme Court, 1885.)

Injunction to stay waste during suit to determine title. Where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extraction of ores from a mine, it is proper to issue an injunction, though the title be in litigation.

Appeal from the Circuit Court of the United States for the District of Colorado. The facts which make the case are stated in the opinion of the court.

ELIHU ROOT, for appellant.

T. M. PATTERSON and C. S. THOMAS, for appellee.

FIELD J.

This is a suit in equity ancillary to the action for the possession of the mining claim just decided. It is brought to restrain the commission of waste by the defendants pending the action. The bill sets forth the discovery by one Thomas Carroll, a citizen of the United States, while searching on behalf of himself and the plaintiff, also a citizen, for valuable deposits of mineral on vacant unoccupied land of the United States, of the outcrop of a vein or lode of quartz and other rock, bearing gold and silver in valuable and paying quantities, the posting by him in his name and that of the plaintiff, at the point of discovery, of a notice that they claimed 1,500 feet on the lode, the intrusion of the defendants upon the claim, their ousting the locators, and other facts which are detailed by the record in the case decided, and the commencement of the action at law. It also alleges that the defendants were working the claim, and had extracted from it 150 tons, or thereabouts, of ore, containing gold and silver of the value of \$25,000, and that about 100 tons remain in their possession on the premises. The bill

¹S. C. below, 4 M. R. 432.

prays for a writ of injunction restraining the defendants from mining on the claim, or extracting ore therefrom, or removing any ore already extracted, until the final determination of the action at law. The principal facts stated in the bill are supported by affidavits of third parties. The court granted a preliminary injunction, but, after the trial of the action at law, judgment being rendered therein in favor of the defendants, it dissolved the injunction and dismissed the bill. From the decree of the court the case is brought here by appeal.

It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to the title was deemed sufficient to exclude the jurisdiction of the court. In *Pillsworth v. Hopton*, 6 Ves. 51, which was before Lord Eldon in 1801, he is reported to have said that he remembered being told in early life from the bench "that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction." This doctrine has been greatly modified in modern times, and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court as exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title: *Jerome v. Ross*, 7 Johns. Ch. 315, 332; *Le Roy v. Wright*, 4 Saw. 530, 535.

As the judgment in the action at law in favor of the defendants has been reversed, and a new trial ordered, the reason which originally existed for the injunction continues.

The decree of the court below must therefore be reversed, and the cause remanded, with directions to restore the injunction until the final determination of that action; and it is so ordered.

BULLION, BECK & CHAMPION MINING CO. v. EUREKA
HILL MINING CO. ET AL.

(13 Pacific Rep. 174. Supreme Court of Utah, 1887.)

¹ An appeal does not stay the operation of an injunction, and its disobedience pending appeal may be punished as for contempt.

² But it is suspensive of any acts affirmative in character. And possession can not be taken under the terms of an injunction restraining interference with the possession of complainant when complainant is not, in fact, in possession,

An injunction can not be made to do the office of ejectment.

Appeal on proceedings for contempt.

ARTHUR BROWN and SUTHERLAND & McBRIDE, for appellants.

BENNETT, KIRKPATRICK & BRADLEY and W. H. DICKSON, for respondents.

BOREMAN, J.

The appellant company, and John Beck, its superintendent, and H. H. Day, its manager, were by the district court adjudged guilty of "contempt of court, as charged," upon a charge of violating an injunction contained in the judgment in favor of respondent company, on the cross-complaint filed in the principal case, and a fine was imposed upon each. The parties adjudged to be in contempt have appealed to this court.

The injunction clause referred to, and under which the contempt proceedings were instituted, is as follows: "And it is further adjudged that the plaintiff company, and its officers, agents, employees, and all persons acting under them, are enjoined and restrained from entering upon said Eureka lode, or digging therein, or removing or extracting any ores therefrom, for the entire length of said lode, between vertical planes made on the end lines of the Eureka mining claim, and exten-

¹ *Sheaffer's App.*, 100 Pa. St. 379.

² See *Cole v. Cady*, 3 N. W. Rep. 322.

sions of said end lines, and from any part of the width of said lode, either under the surface of said Eureka mining claim, or beneath the surface of the said Bullion mining claim, lot 76, or easterly of said line above described, or westerly of said line at depth, if the lode in its dip below the 300-foot level shall extend westerly; and from interfering with or in anywise hindering the defendant company from taking possession of and working said lode within the bounds aforesaid, and on the dip of said lode, though at greater depth it shall extend further westerly."

An appeal had been taken from the judgment containing the injunction clause, and the proper *supersedeas* bond had been given before the contempt proceedings were instituted.

The charge made against these parties in the contempt proceedings is that they have been using "two certain drifts for the purpose of conveying * * * ores extracted west of said blue line" to shafts of appellant company, and "thereby hindering and obstructing the defendant company, and preventing it from using the same, and working its Eureka claim and lode through the same;" and that on one certain day they "excluded defendant company's superintendent and employees by force from said drifts, and by such means and force, and by the continued use thereof, prevented defendant company from using and working the same." These drifts were underneath the surface of the Bullion lot 76. The district court adjudged the parties to be guilty of "contempt of court, as charged."

The taking of the appeal, and the giving of the *supersedeas* bond, did not make void or nullify or suspend the judgment, nor the injunction contained therein, but all affirmative action looking to the execution of the terms of the decree were suspended: *Slaughterhouse Cases*, 10 Wall. 273; *Swift v. Shepard*, 64 Cal. 423. But the lower court could nevertheless take such action as was necessary to hold the property intact, and enforce a continuance of the *status quo*. However, the district court, during the pendency of the appeal, could do no act which did not look to the holding of the subject of litigation just as it existed when the decree was rendered: *Hovey v. McDonald*, 109 U. S. 161. In the exercise of its authority to preserve the property, the district court was empowered to punish as for contempt for the violation of any

BULLION M. CO. v. EUREKA HILL M. CO. 451

provision of the injunction, where the parties were not allowing the property to remain as it was at the date of the decree. If this were not so, the recovery in the appellate court might often be a barren victory: *Sixth Ave. R. R. v. Gilbert*, 71 N. Y. 430; *Heinlen v. Cross*, 63 Cal. 44; *State v. Chase*, 41 Ind. 356.

It is not charged that the parties adjudged to be in contempt were "digging or removing or extracting any ores" from the premises in dispute. Nor is it claimed by the respondent company that it was in any manner prevented from "taking possession;" and so much of the charge as refers to excluding the respondent company by force is waived. The residue of the charge has reference to the appellants using the two drifts, and thereby hindering the respondent company from using them, and working its claim and lode. We do not think that the evidence sustains this allegation. The decree adjudged the respondent company to be in the possession. That, no doubt, was the legal and constructive possession of the whole ledge. But this does not preclude the appellant company and its employes from showing that they were in the actual occupancy of the two drifts in question when the decree was rendered. Such possession by appellants was, perhaps, tortious, if classed as an occupancy of the lode; but it existed, and was in no way an obstruction to the respondents working the lode. Those drifts were vacant spaces on the Bullion claim 76, owned by the appellant company, but extended through the lode of respondent company, which lies under the surface of the Bullion claim 76. Taking all of the evidence together, we do not see that the appellants, at the time they are charged with having violated the injunction, occupied any other or different place on the lode in question than they did when the judgments containing the injunction was rendered, or that they were, in any manner, hindering or obstructing the respondent company from working its lode. This being so, the injunction could not be used to eject them; and it was no violation of the injunction for the appellants to remain as they were when the injunction was granted.

The judgment of the district court adjudging the appellants to be guilty of contempt, and to pay a fine, is reversed, with costs to the appellants.

ZANE, C. J., and HENDERSON, J., concur.

1. Owners of water may enjoin diversion though they do not own the ditch: *Clifford v. Larrien*, 11 Pac. 397.

2. A corporation maliciously and without probable cause obtained an *ex parte* injunction enjoining mining; afterward suit was dismissed: *Held*, that an action lay for malicious prosecution and that all the circumstances, even including the amount of profit which might have been made, were admissible to enable the jury to assess the just measure of damages: *Newark Coal Co. v. Upson*, 40 Ohio St. 17.

3. The court from which appeal has been taken may enjoin pending the appeal: *Bullion Co. v. Eureka Co.*, 12 Pac. 660.

COWAN V. RADFORD IRON CO.

(3 S. E. Rep. 120. Virginia Supreme Court of Appeals, 1887.)

Lease distinguished from sale. ¹ Lessor entitled to rescission of abandoned lease. Articles of agreement were entered into by which plaintiff sold to defendant all the minerals, etc., the second party agreeing to pay a royalty *quarterly* at so much per ton, with the usual mining rights, the right to remove buildings, etc., but with no covenant to work. Defendant entered, did some little mining, then quit, removed its plant and assumed the position that it was not bound to either surrender or work, claiming ownership of the minerals subject only to royalty when taken at its pleasure: *Held*, that the articles were a lease, that the tenant was bound to work and pay quarterly, and on refusal to either work or surrender, the instrument ought to be rescinded by decree.

Appeal from Circuit Court, Pulaski County.

J. C. WYBOR, for appellant.

J. E. MOORE, for appellee.

LACEY, J.

This is an appeal from a decree of the Circuit Court of Pulaski County, rendered at the March term of said court, 1885. The bill was filed in January, 1884, to have rescission of an agreement made between the parties in 1880, for the sale of the iron ore on the farm of the appellant, which agreement is as follows:

"Agreement this day made and entered into by and between George W. Cowan, of the first part, and the Radford Iron Company of Virginia, of the second part, witnesseth that, for the consideration hereinafter expressed and contained, the said George W. Cowan has this day sold to the said Radford Iron Company all the ores, minerals and valuable mineral products and substances upon and under the soil and surface of all that certain tract or parcel of land lying and being in the county of Pulaski and State of Virginia, on the south side

¹Porter v. Noyes, 10 N. W. 77; Tiley v. Moyers, 4 M. R. 320.

of New river, containing seventy-seven and one half acres, and bounded as follows, to wit: Beginning * * *

"And it is understood, stipulated and agreed, by and between the said parties of the first and second part, that the sale of the ores, minerals and mineral products, upon the said tract or parcel of land, carries with it and vests in the purchaser the usual mining rights and privileges, that is to say, the right to enter at any time from and after this date upon the said land, with workmen, horses, wagons, carts, machinery and mining tools and implements, and to dig for mine and explore, and to raise and carry away from or to deposit upon the said land all ores, minerals and mineral substances which may be found on or under the soil or surface thereof. Also to use and employ sufficient surface room upon the said tract of land to erect and operate machinery and fixtures for mining and raising the ores, and pumping water from the mines, and to construct drains and ditches for carrying off the water so pumped; and also to use and employ sufficient surface room for the deposit of the refuse matter taken from the mines, and for the deposit of the ores and minerals taken from the mines, until the same can be conveniently transported. Also the right and privilege to erect upon the said tract or parcel of land dwellings for the hands and workmen employed in and about the mining operations, and stables for the horses used in mining and transporting the ores and minerals; also to make and construct and freely to use, all such roads and wagons over and through the said tract or parcel of land as the convenient development and working of the mines and the transportation of the ores, minerals and other things connected with the mining operations may require, embracing a road from the mines to connect with the Lead Mine road at the most suitable point; also to use water for washing the ores, and to take from the said tract or parcel of land, without charge, all timber necessary for mining purposes, and the erection of machinery and fixtures employed. But the privilege of taking timber is limited to such as is unfit for making rails. And it is further and expressly agreed by and between the said parties that the party of the second part, their representatives, successors or assigns, shall have the right and privilege of removing from the said tract of land at any time

any machinery, building, fixtures or improvements made or erected by that party upon it.

“The said Radford Iron Company covenants, promises and agrees to pay to the said Cowan in quarterly payments, fifteen cents per ton of 2,240 pounds for all the iron ores taken from his land by them, the amount of the ore so taken to be determined by the books of said company, their successors or lessees.”

This agreement having been executed on the twenty-second day of June, 1888, in the summer and fall of that year, the company, in pursuance of its provisions, entered upon the said land, removed a small quantity of ore therefrom, some 200 tons, paid to the appellant fifteen cents per ton for the same, and then, for reasons which to them seemed sufficient, abandoned the enterprise, and have not since concerned themselves with the said land. But the agreement being of record, and appearing uncanceled and unreleased, when the appellants sought to place his iron ore into the hands of other operators, the said agreement deterred them from any dealings concerning the said iron ore. The appellant then applied to the said company, as they had abandoned the business, to enter upon record a release or cancellation of the agreement which would enable him to make sale of this iron ore to others. This the company refused to do, either without or upon a consideration, and announced their claim and asserted the right to hold this agreement as a deed by which they had purchased the ore in question, under which they were under no binding obligation to operate nor to pay any consideration, until it should comport with their own views of their interest in the matter; that they did not propose to mine iron ore at a loss, nor would they allow others to operate this iron ore at a profit. The Circuit Court sustained the pretension of the defendants and, holding that the plaintiff was not entitled to any relief in the premises, dismissed his bill, whereupon he appealed. The question to be considered here is, what is the true construction of this agreement which has been recited in full? It is elementary that every contract must receive a reasonable construction. An agreement to pay money, no time being specified, has been held to be an agreement to pay the same on demand; while an agreement to do something

other than to pay money, no time being expressed, means a promise to do it within a reasonable time: *Warren v. Wheeler*, 8 Metc. 97; *Atwood v. Cobb*, 16 Pick. 227; *Ryan v. Hall*, 13 Metc. 520; *Thompson v. Ketcham*, 8 Johns. 189; *Barry v. Ransom*, 12 N. Y. 462.

Regard should be had to the intention of the parties, and such intention should be given effect. To arrive at this intention regard is to be had to the situation of the parties, the subject-matter of the agreement, the object which the parties had in view at the time, and intended to accomplish. A construction should be avoided, if it can be done consistently with the tenor of the agreement, which would be unreasonable or unequal, and that construction which is most obviously just is to be favored, as most in accordance with the presumed intention of the parties: *Howeth v. Anderson*, 25 Tex. 557; *Warner v. Hitchens*, 5 Barb. 669; *Halloway v. Lacy*, 4 Hunph. 468.

The agreement in question may be denominated a "mining lease." The ore and minerals are sold and the purchaser is invested with the usual mining rights, which are enumerated. These rights are to begin at once, at any time after the date of the agreement, the compensation is to be paid quarterly, as the iron ore is mined. No time is specified for the work to end, and for these rights to expire. But a stipulation is inserted, by which it is further and expressly agreed that the company shall have the right and privilege of removing from the said tract of land, at any time, any machinery, buildings, fixtures or improvements made or erected upon it by the said company. If one party may, then, terminate the lease at any time it may will it; if this estate is at the will of one of the parties, it is equally at the will of the other.

As was said by Downey, C. J., in *Knight v. Indiana Coal Co.*, 47 Ind. 105, "It is a well settled and well known rule of law that a lease or estate, which is at the will of one of the parties, is equally at the will of the other party. One of them is no more and no further bound than the other. As the lessee in this case had the clear right, at his will, to terminate the tenancy at any time, so also had the lessor. It can not be otherwise." Blackstone says (Book 2, 135): "But every estate at will is at the will of both parties, landlord and tenant; so that

either of them may determine his will and quit his connection with the other at his own pleasure." Kent says (Vol. 4, 111): "It was determined very anciently by the common law and upon principles of justice and policy that estates at will were equally at the will of both parties, and neither of them was permitted to exercise his pleasure in a wanton manner and contrary to equity and good faith." See also the case *Doe v. Richards*, 4 Ind. 374.

The lessee having abandoned the work, failed to mine, and failed to pay anything quarterly, as the lease provides, it must be held to have terminated the estate as it had the right to do, and the lessor is no more and no further bound thereby. The said agreement being no longer of any binding obligation upon the parties thereto, still, in violation of the just rights of the lessor, remains unreleased and uncanceled upon the records, to hinder him in the full enjoyment of the property which is his. The lessee can not refuse to execute the contract according to its plain and most reasonable interpretation, refuse to mine the ore and pay for the same quarterly according to its contract, and yet justly maintain any other rights concerning the same. Its rights under the contract having terminated it could not reasonably object to a rescission of the lease, and the Circuit Court of Pulaski County could refuse its aid in this behalf upon no just ground.

And the decree of the said court, dismissing the bill of the plaintiff upon the ground that he was entitled to no relief in the premises is erroneous and must be reversed and annulled, and such decree entered here as the said circuit court should have rendered.

1. Construction of covenant for royalty holding that defendant was not bound to payment for coal not mined: *Reed v. Beck*, 23 N. W. 159.

2. A verbal contract to allow working on royalty but not compelling the party to work, *held*, a license only, and revocable: *Wheeler v. West*, 71 Cal. 126.

3. Ratification of lease of unauthorized agent: *Hoosac Co. v. Donat*, 16 Pac. 157.

¹ARMSTRONG ET AL. V. LOWER ET AL.

(6 Colorado, 581. Supreme Court, 1883.)

²Distinction between pure occupancy and a locator's title. Under the Federal and State statutes, two kinds of possession of mining ground are recognized: first, when the miner holds by occupancy alone; second, when he holds the full claim by virtue of a compliance with the location statutes. But when one attempts to make a statutory location of a full claim, and fails to comply with the law, all that portion of the location as marked on the surface, of which he is not in the actual occupation, is open to exploration and re-location by others.

Vein presumed to extend length of claim. The position of the vein with reference to the location is a fact upon which some proof must appear. But slight proof, however, will be sufficient to establish *prima facie* that the vein extends throughout the claim.

Appeal from District Court of Custer County.

MONTGOMERY & RISING and JOHN W. WARNER, for appellants.

HUGH BUTLER, for appellees.

Upon a petition for rehearing the following opinion was rendered by HELM, J.

This application has been urged with more than ordinary skill and ability, and we have sought to give the questions presented the careful consideration which the industry of counsel and importance of the case merit.

We recognized in our opinion the right of petitioners to recover, at the former trial of this case, upon proof of prior actual possession of the premises in dispute.

Under the Federal and State statutes, two kinds of possession of mining ground are recognized: first, where the miner by virtue of work and improvements upon a tract of mineral land, and occupancy thereof, holds the same, independent of location statutes, against one having no better right; secondly, where, after discovering a vein, the miner

¹ S. C. on original hearing, 15 M. R. 631.

² *Garthe v. Hart*, 15 M. R. 492.

undertakes to avail himself of the benefits of the location statutes. The law gives him possession of his entire claim as marked upon the surface, for the period of ninety days from the date of discovery, provided he post his discovery notice, and, within sixty days next after such date, sink his discovery shaft. Having perfected his location by a full compliance with the requirements of the statutes, his possession of the entire claim remains until he does or omits to do something which in law amounts to an abandonment thereof.

But when he has failed within the proper time to comply with the location statutes, we do not understand that he can, by virtue of actual possession of one hundred feet of the lode, hold the entire one thousand five hundred feet thereof, as against one who enters after such failure, and acquires rights in the territory before he has perfected his location. By such failure he forfeits all right to any benefit from his partial compliance with the statutes, except as he may be aided thereby in his proof of actual possession; the remaining one thousand four hundred feet of his lode are open to exploration and location as though he had never attempted to perfect a statutory location thereon. To hold otherwise would largely do away with the usefulness of location statutes, for their principal office is to protect him, prior to patent, in the exclusive use and enjoyment of his lode and surface ground to the full extent of his claim.

These views do not conflict with the authorities cited. The learned judge, in *Harris v. Equator M. Co.*, 12 M. R. 178, does not pass upon this question; he expressly distinguishes between the position of a purchaser and that of the locator of a mining claim, and confines his opinion to the former. In *English v. Johnson*, 17 Cal. 108, the court limit the views expressed to cases where no abandonment results from a failure to comply with the mining rules or location statutes.

But a small part of the alleged Swallow Tail re-location is in dispute in this action. And the only acts of possession disclosed in the evidence of this disputed territory by petitioners is the erecting of their discovery stake at the "old shaft" and the posting of a notice stating where the location work was being done. This we held and still hold insufficient to show such *actual possession* of said territory as would enable

them to recover the same in this action. Being unable to recover upon their actual possession, they were remitted to their proof of a valid re-location. The construction of their tunnel upon another part of the claim could not avail them unless their re-location was good; if it were valid, they would hold possession of the disputed territory by virtue thereof; if it were not valid, actual possession was required, which they did not have.

Counsel for appellees in their original brief quoted from *Highland Chief v. Evans*, 1 Col. Law Reporter, 217, as follows: "On the public domain of the United States a miner may hold the place in which he may be working against all others having no better right. But when he asserts title to a full claim of fifteen hundred feet in length by three hundred feet in width, *he must prove a lode extending throughout the claim.*" They italicized the last clause of the quotation, and we certainly understood them as advancing the argument that since the proof did not affirmatively establish the fact that the Verde vein extended to the portion of the Verde claim whereon petitioners had excavated the Swallow Tail discovery tunnel, they were entitled to recover upon the theory that such territory was vacant and subject to location. And we understand counsel as urging substantially the same proposition upon this petition.

We have discovered no reason for changing the views expressed in our former opinion. Counsel is correct in his statement that the Verde owners are not a party of record, and have nothing to do with this controversy. But a question with reference to the Verde vein was fairly presented under the law, by the evidence and argument. And for the purposes of the decision upon the point under consideration, it was as if the controversy had been between petitioners and the Verde owners. The position of petitioners, who were appellees, was, as we understand it, that appellants should have proven that the Verde vein extends throughout the Verde claim, or at least to the portion thereof whereon was constructed the Swallow Tail discovery tunnel. Appellants asserted that a valid location of the Verde was established under the pleadings, and that it was for petitioners to prove that the vein departed from the side line, or terminated at

some point distant from the end line thereof. If the vein did so depart or terminate, the portion of the claim beyond such point of departure or termination was open to location by petitioners, and the construction of the discovery tunnel thereon was perfectly proper and legal. The question presented was, should appellants be required to prove, in the first instance, that the Verde vein extended throughout the claim, or should petitioners be compelled to show a departure or termination thereof at some point short of the ground upon which they did their location work?

We agreed with appellants, and placed the burden upon petitioners of proving by a preponderance of evidence such departure or termination of the Verde vein.

In the discussion of this question in our opinion we declared that where one had discovered a lode, and performed all of the subsequent acts required to constitute a valid location, he is entitled to the presumption that his vein extends throughout the full length of his claim. Counsel seems to misunderstand the meaning of the language we used. We do not deny that the position of the vein with reference to the location is a fact upon which some proof must appear. It seems to us that upon a critical examination and fair construction, our language will be found not to conflict with this view.

Proof of the essential acts of location almost necessarily implies some proof as to the position of the lode. We can hardly conceive how one could prove the discovery of his vein, the sinking of his discovery shaft thereto, the erection of his boundary stakes and the other essential acts of location, without giving evidence of some kind as to the strike of the vein. Such evidence may not affirmatively show its course for more than the distance across the discovery shaft; and though not more than five or six feet of the course be actually determined, yet, if the location be made along the vein thus disclosed, projected in either direction, it is *prima facie* sufficient. We may recognize a presumption that the apex of the vein does extend throughout the location.

It may, perhaps, be more accurate for us to omit the objectionable word "presumption" and say that the foregoing facts being proven, the jury may infer therefrom, in the absence of contrary proofs, that the vein extends throughout the en-

ture claim. In other words, that these facts are sufficient *prima facie* to establish the remaining fact as to the position of the vein in all those portions of the location wherein it has not been actually traced. But whether we use the word "presumption" or the phrase "*prima facie* proof," the result, so far as concerns the question under consideration in this case, is precisely the same.

The position of the vein is a fact which in many cases must be proven largely by inference and opinion. If the apex thereof crops out along the surface, its strike may be readily traced; but if it be entirely below the surface, it is extremely difficult, and in some cases impossible, without the expenditure of large sums of money, to definitely determine its course for a distance of fifteen hundred feet; and when the prospector has determined that course, according to the best information he has been able to obtain in the time allowed, and has expended labor and money in performing all of the acts required to constitute a valid location thereon, we think he is justly entitled *prima facie* to the protection of the location statutes.

These are the views announced in our former opinion, and we are not yet convinced that they are erroneous. The rehearing will be denied.

Rehearing denied.

EILERS V. BOATMAN ET AL.

(3 Utah, 159. Supreme Court, 1883.)

Monuments not placed on account of precip'ce. The west 600 feet of the Nabob lode, a 1,500-foot claim, were not staked, because the ground was precipitous and inaccessible. A later locator placed his stakes so as to include that part of the Nabob which was staked, and its workings then in operation. The prior location was upheld.

Exactness in setting stakes is not required of the locator. The difference of a few feet between the location stakes and the stakes set on survey for patent, is immaterial.

Location over drift run beyond its claimant's lines. The fact that the vein underneath a location was being worked by a party who was following a vein after it had left its patented side lines does not vitiate the location of the ground so made over such workings.

Affirmed, 15 M. R. 471.

¹ Secret underground mining by parties having neither a patented or possessory title will not prevent a valid location by third parties on the surface embracing the apex of the lode.

² A finding that a party is in possession, in a suit supporting an adverse claim, is not necessary where the facts found show a lawful location and a right to the possession.

Appeal from the Third District Court. The opinion states the facts.

SUTHERLAND & McBRIDE, for appellant.

BENNETT & HARKNESS, for respondents.

EMERSON, J.

The defendants in this case having made application for the government title to a certain mining claim, called by them the "Nabob," the plaintiff filed an adverse claim to a portion of the premises, as a part of the "Virginia" mining claim, which was discovered, located and owned by him, and in due time he commenced this action to determine the right of possession of the ground in controversy. The case was tried in the court below, without a jury, and resulted in a judgment for the defendants. The plaintiff appeals from the judgment, and also from an order denying his motion for a new trial. The findings of fact and conclusions of law are as follows:

(1) On or about the fourth day of July, 1877, the defendants located the Nabob mining claim, situate in Little Cottonwood mining district, Salt Lake county, Utah, upon a lode of rock in place bearing silver and other metals, the claim consisting of 1,500 feet in length, to wit, 50 feet southeasterly from the discovery point, and 1,450 feet northwesterly from the same point; that a notice of location was posted at the discovery point, in which was given the date of location, to wit, July 4, 1877, the name of location, the extent of claim, and described the same as situated on Flagstaff hill, about 150 feet, more or less, westerly from the discovery shaft of the Flagstaff mine, and about 36 feet, more or less, northeasterly from the northerly side line of the Rough and Ready patented

¹ *Pardee v. Murray*, 15 M. R. 515.

² *Wolcorton v. Nichols*, 15 M. R. 309.

ground; and the metes and bounds were therein stated to be described by a stake driven 50 feet southeasterly from the discovery shaft marked No. 1; thence running northwesterly 500 feet to a red pine stump, blazed on north side; thence to a tree over the divide marked 900 feet; thence to a point 600 feet distant in Day's fork. A copy of the same notice was filed for record in the office of the recorder of said mining district on the ninth day of July, 1877.

(2) That said locators remained in possession of said claim, actually working the same by an incline run downward from the discovery point, until after the location of the Virginia mining claim, and on the day of the location of the Virginia mining claim, the Nabob was being worked by several men on the conflict area, and a shanty was there erected.

(3) That the locators and claimants of the Nabob mining claim, in each year since the location, have done more than \$100 worth of work thereon.

(4) That at the time of the location the locators marked the claim on the ground by setting a stake at the discovery point, by setting a stake in the middle of the southeasterly end line, marked "No. 1, Nabob," by setting a stake at each corner of the southeasterly end line, by blazing and marking a red pine stump on the center line, about 500 feet northwesterly from the southeasterly end center stake, and by blazing and marking a tree on the center line, about 900 feet northwesterly from the southeasterly end of the claim; that no marks on the ground were made either by the locators, or the surveyors who surveyed the claim for a patent, on the northwesterly 600 feet of the claim, the ground being down a steep and inaccessible declivity, and the patent survey of that portion being made by triangulation; that the survey of the Nabob mining claim, as set forth in the answer, is substantially in conformity to the boundaries thereof as located.

(5) That on the tenth day of August, 1877, the plaintiffs located the Virginia mining claim, and recorded the same, and marked it on the ground so as to include the conflict area in dispute, and on which the defendants were at work as aforesaid. The notice posted and recorded was sufficient, under mining laws, and the plaintiffs have yearly done more than \$100 worth of work thereon.

As a conclusion of law it was found:

(1) That the notice of the location of the Nabob mining claim contained a sufficient description by reference to natural objects, and permanent and well known monuments, to identify the same.

(2) That said Nabob claim was so marked on the ground that its boundaries could be readily traced.

(3) That by reason of the prior location of the Nabob mining claim, and a compliance in respect thereto with mining laws and customs by the defendants, the defendants, at the commencement of the suit, were, and still are, entitled to the possession of the area in conflict with the Virginia claim, and are now entitled to judgment for said area and costs.

The motion for a new trial was based upon the following grounds, viz.: "*First*, insufficiency of the evidence to justify the findings of fact made by the court; *second*, that the findings and decisions are against law."

Under the first assignment are the following specifications, viz.: *First*, the evidence shows that the boundaries of the Nabob claim were not established, or the limits of the claim defined, at the time of the location, or afterward, until the Virginia was located, surveyed and marked on the ground and recorded; whereas, the first and fourth findings of fact find that the defendants located the Nabob by the metes and bounds described therein, and marked the same on the ground. *Second*, the notice of the location of the said Nabob claim, as posted and recorded, is insufficient either as a notice or a record to indicate the existence of any lawful claim. On the ground that the findings and judgment are against law, the following are the specifications of error, viz.: *First*, "the notice of location on the Nabob was insufficient." "The notice of the claim as recorded was insufficient." *Second*, "the claim was not so marked on the ground that its boundaries could be readily traced, or so that they could be found, until after the survey and location of the Virginia claim." *Third*, "the lode upon which the claim called the Nabob was located, including all that part in controversy, was then occupied under ground, and had been since 1862, as a mine of the Flagstaff Silver Mining Company, who then and always had claimed to own the vein; and no adverse claim could be initiated to it by the defendants under such circumstances."

Fourth, "the Nabob location having been made on a vein then actually occupied for mining purposes by other parties the same was void, and could convey no right or title to the possession upon which a claim for a mineral patent could be based; and the judgment that the defendants are the owners of said ground in dispute is erroneous."

The second assignment of error under the first ground of the motion for a new trial, and the first assignment under the second ground, seem to have been abandoned by the appellant, as neither is mentioned in his brief nor referred to on the argument. The record contains no copy of the notice of the Nabob location. According to the findings of the court, which we must presume were supported by evidence, the conclusion of law that the notice contained a sufficient description by reference to natural objects, and permanent and well known monuments, to identify the same, was correct. The evidence establishes the fact that the southeasterly 900 feet of the Nabob claim was, at the time of its location, plainly marked out on the ground, not alone by posts and stumps distinctly marked along the center line of the claim, but also by stakes at both corners of the southeasterly end, and by trees and stumps on the side lines at points 900 feet northwesterly from them. This is established, not only by a strong preponderance of evidence, but by evidence which removes from the mind all reasonable doubt even, of the facts as found by the court. The northeasterly 600 feet of the claim was not marked on the ground, because it was impossible to do so, owing to the nature of the surface. The locator testifies that he put no marks on this portion of the claim, "because of the inaccessible and precipitous nature of the ground beyond the divide." The surveyor who surveyed the claim for a patent, testified that "the northwesterly 600 feet of the claim was surveyed by triangulation, and the lines and corners were not established on the ground, because of its precipitous surface."

The defendants claimed 1,500 feet in length on the course of the vein, and 900 feet of the claim was plainly marked out on the ground, with courses and distances given, sufficient to point out to any one honestly endeavoring to ascertain where the lines were for the balance of the 1,500 feet. No one could have been misled by the want of stakes on the accessible

portion simply because it was inaccessible, and that such was the nature of the ground is an undisputed fact in the case.

The proofs show that the plaintiff, at the time he made his location of the Virginia, was not, to say the least, a very anxious inquirer as to the boundaries of the Nabob, for at that time he found the owners of the latter claim at work in a shaft at or near their discovery point, and without making inquiry as to the direction or extent of their claim he completed his location, taking in and including the very ground upon which the defendants were at the time actually working, and which is included in the conflict area. It is sufficient to give a right to the occupants of mining ground on the government domain which the courts will protect, to establish by evidence its appropriation by means which are a substantial compliance with the law upon that subject, and which, in view of the surrounding circumstances, will give notice to those who have a right to know that the particular mining ground is subject to the dominion and control of some private claimant. The mining laws do not, no more than any other law, require parties to perform impossibilities. The same preponderance of testimony shows that the boundaries of the Nabob claim as surveyed for a patent are substantially the same as those described in the location and marked on the ground at the time the location was made. There was testimony showing a somewhat promiscuous marking of trees with the word "Nabob" in various directions, and entirely off from the ground claimed, and located by the defendants. The clear inference to be drawn from all the testimony is that this marking was done by some party unknown to the defendants, and hostile to their interests, and would indicate an attempt to confuse the boundaries of the Nabob claim.

The findings of the court "that the survey of the Nabob mining claim, as set forth in the answer, is substantially in conformity to the boundaries thereof as located," is abundantly sustained by the evidence. It is neither expected nor required that the locator of a mining claim, in marking his claim on the ground so that its boundaries can be readily traced, shall be exact in running the lines, or in fixing the corner or other posts. It is rarely, if ever, that he has either the time or facilities for making an accurate survey, and a difference of

three or four feet or a few points, as stated in this case, between the monuments fixed by an actual survey for a patent and those fixed at the time of location, is immaterial, and does not affect the validity of the original location.

All the findings of the court relative to the location and marking the boundaries of the Nabob claim are abundantly supported by the evidence, and the correct conclusions of law were drawn therefrom.

A further contention on the part of the appellant is that the ground in conflict was not subject to location by respondents at the time this notice of location was posted, because, at that date and for a long time prior thereto, the Flagstaff Mining Company were in actual possession of the lode and conflict ground, and working the same; that the respondents could not make a valid location on a lode in the actual possession of another, whether such possession was lawful or not. I have had access to, and have examined nearly all the long list of authorities referred to by the appellant in support of the above proposition, and all of those examined refer to the acquisition of agricultural lands, where the acts constituting the possession or the right to possession must be upon or done in reference to the surface. There is a distinction recognized by the courts between the acts essential to indicate the possession and occupancy of agricultural lands, and those necessary to show occupancy and dominion of a mining claim: *English v. Johnson*, 17 Cal. 115. If the above proposition of the appellant is true, as applied to the facts in this case, it defeats his own right to recover. He is the plaintiff, and to entitle him to recover he was bound to establish his right as against the respondents to the conflict area. To show this otherwise than by a paper title from some paramount source it would be incumbent on him to prove his prior possession or appropriation of it in some mode which the law sanctions. If the facts set out in the record constituting the possession of the Flagstaff Company rendered the location of the respondents void, that of the appellant would be equally so, as the same facts existed in reference to that.

In reference to the possession of the conflict area by the Flagstaff Company, the record discloses "that the Flagstaff mine had been owned by the Flagstaff Silver Mining Company

of Utah, since February, in the year 1872;" that a claim 2,000 feet in length, 1,000 feet northerly of discovery, had been patented to the company's grantors, and conveyed it to the surface lines of the patent, embracing only about 100 feet on the length of the lode; that claiming, notwithstanding the course of the patent lines, that it had a right to follow the lode for the length described by the patent, the company and its grantors had extended its works beyond the lines covered by the patent, with and along the course of the vein under ground, beyond that portion the apex of which crops out in the ground in dispute between the plaintiff and defendants; that drifts and levels driven from the discovery shaft and main working shaft of the Flagstaff mine had penetrated the hill along the vein on its dip and strike to the northerly, and, at the time of the location of both the Nabob and Virginia claims, was used, held and occupied at various depths by those having possession in behalf of said company, and that the workmen and miners in both Virginia and Nabob, before reaching the depth of 100 feet, distinctly heard the workmen employed in the Flagstaff mine, and the mining works were actually connected at different points under ground; that the Virginia tunnel, indicated on the map of the underground works, was connected with the old Flagstaff works at a point about 140 feet in depth, and the Nabob at other points not exceeding that; that the vein was occupied on its course and dip by said Flagstaff Company to a distance northwest exceeding the limits of the ground in dispute, said occupation being entirely under ground and not visible on the surface." In other words, and in brief, the patent of the Flagstaff Company embraced only about 100 feet on the length or course of the vein, this claim having been laid and patented across the vein, and not along on its course.

According to a decision of this court in a case against this same company, involving its right to extend its workings beyond the side lines of its claim, and which was affirmed by the Supreme Court of the United States, the side lines of the Flagstaff location are, in effect, the end lines of this claim on the course of the vein: *Flagstaff M. Co. v. Tarbet*, 98 U. S. 463. The Flagstaff Company were, according to the facts, secret, underground trespassers in exploring and working

beyond the side line of this location, and under the surface ground in dispute. The possession of a vein recognized by the mining laws, and to which protection is given, is by one who holds the surface where the vein makes its apex. The location of a vein or lode made upon the surface where the vein or lode finds its apex, will not be defeated by the secret underground workings and possession by parties having no possession of or right to the surface embracing it. The secret underground trespass of the Flagstaff Company does not affect the rights of either the appellant or respondents.

It is conceded by the respondents, and it is doubtless true, that, as between two locators, and as affecting their rights only, one can not locate ground of which the other is in actual possession under claim or color of right, because such ground would not be vacant and unoccupied. This would affect the appellant's right to recover for the conflict area in dispute, it being an undisputed fact that, at the very time when the Virginia was located by him, the respondents, the locators of the Nabob, were in actual possession, sinking their incline shaft, and occupying a shanty on the ground.

It is further contended, on the part of the appellant, that the judgment can not be sustained, because there is no finding of fact that the defendants were in possession of the property in controversy at the time of filing the answer, or at the commencement of the action. He claims that this is a jurisdictional question, and may be taken advantage of at any time. It is difficult to conceive how the want of possession by the defendants can be a jurisdictional question, as affecting their right to a judgment in their favor, if the plaintiff, who had inaugurated the suit against them, failed to make out his case. The judgment settled the rights of the defendants to the conflict area only as against the plaintiff. There being no other adverse party to the record, no one else is bound by it; and besides, the facts as found by the court establish the defendants' right to the possession, and that they had done all that is required by law in order to inaugurate a title to and hold a valid mining claim, and that they were, constructively at least, if not actually, in possession.

The judgment is affirmed.

EILERS V. BOATMAN ET AL.

¹ (111 U. S. 356. Supreme Court, 1884.)

Location is a question of fact. A finding by the Supreme Court of a Territory that the notice of the location of a claim contained a sufficient description, by reference to natural and permanent monuments, to identify it, and that the claim was so marked upon the ground that its boundaries could be readily traced, is a finding of fact; and, though styled by the judge a conclusion of law, must, by chapter 80 of the act of April 7, 1874, be taken by the appellate court to be true.

Appeal from the Supreme Court of Utah.

Action for the settlement of adverse claim against application for patent under § 2326, U. S. Rev. Stat.

C. K. GILCHRIST, for appellant.

C. W. BENNETT, for appellees.

Mr. Justice MILLER delivered the opinion of the court.

This, like the preceding case, (*Chambers v. Harrington*, 111 U. S. 350,) is an appeal from the decree of the Supreme Court of Utah in a contest for a mine carried on under section 2326 of the Revised Statutes. The appellant does not deny the priority of location, or the continuous work on the Nabob, the claim of the appellee, but insists that the notice and description of the claim of the defendants were not sufficient to apprise other prospectors of its precise location. This, in the first place, is matter of fact, and was found by the court below against appellant; for we think that the following language, though called by the judge a conclusion of law, is really a finding of facts, namely: "(1) That the notice of the location of Nabob mining claim contained a sufficient description by reference to natural objects, and permanent and well-known monuments, to identify the same; (2) that said Nabob claim was so marked on the ground that its boundaries could be

¹ S. C. below, 15 M. R. 462.

readily placed." If, however, we revert to the specific findings of fact, so named in the record, we think the second and fourth findings, which give a more minute description of the courses, distances, natural objects and stakes, justify the two conclusions above recited.

A point is made by appellant that the Flagstaff Mining Company was in possession of the lode at the time the Nabob claim was located. We do not see how this would improve the subsequent location of appellant. But it is sufficient to say that no such finding is made by the court in regard to the Flagstaff claim.

By chapter 80 of the acts of Congress approved April 7, 1874, (Supp. Rev. St. 13,) this court is required to accept the findings of fact made by the Supreme Courts of the Territories as true, on appeal to this court. See *Stringfellow v. Cain*, 99 U. S. 610; *Hecht v. Boughton*, 105 U. S. 235.

In this case the Supreme Court, in its judgment, affirms the findings of the district court. As we think the judgment of the Supreme Court of Utah was right on the facts so found, there is nothing left but to *affirm the judgment, and it is so ordered.*

¹ ERHARDT V. BOARO ET AL.

(119 United States, 527. Supreme Court, 1885.)

Effect of location notice pending complete location. A written notice of a claim to fifteen hundred feet on a mineral-bearing vein or lode in Colorado, signed by the discoverer thereof and posted on a stake at the point of discovery, when made in good faith, and not as a speculative location, is a valid location on seven hundred and fifty feet on the course of the lode or vein in each direction from that point, and gives the right of possession to the discoverer until the other steps necessary for completing the title can be taken according to law.

² **The forcible eviction of the discoverer and locator of a mineral-bearing lode or vein from the lode or vein before the sinking of the shaft which the statutes of Colorado require as one of the acts to complete title, and the prevention of his re-entry by threats of violence, excuse him as against the party keeping him out of possession, and so long as he is**

¹ Reversing S. C. below, 4 M. R. 434.

² *Miller v. Taylor*, 9 M. R. 547; *Robinson v. Imperial Co.*, 10 M. R. 370.

kept out of it, from complying with the requirements of the act in respect to a shaft.

Discovery and appropriation are recognized as sources of title to mining claims; and development by working as the *condition* of continued ownership, until a patent is obtained.

Prospector protected pending complete location. Whenever preliminary work is required to define and fix a located mineral claim, the law protects the first discoverer in the possession of the claim, until excavations and development can be made, sufficient to disclose whether a vein or deposit exists of such richness as to justify work to extract the metal.

Notice without discovery inoperative. The mere posting of a notice that the poster has located a mining claim, without discovery or knowledge on his part of the existence of metal there, or in its immediate vicinity, is a speculative proceeding which initiates no right.

One tenant in common may recover in ejectment the entire estate of himself and co-tenants.

In error to the Circuit Court of the United States for the District of Colorado.

This was an action for the possession of a mining claim in Pioneer mining district, in the county of Dolores, and State of Colorado. The claim was designated by the plaintiff as "The Hawk Lode" mining claim, and by the defendants as "The Johnny Bull Lode" mining claim. The plaintiff was a citizen of New York, and the defendants were citizens of Colorado. The complaint was in the usual form in actions for mining claims under the practice in Colorado. It contained two counts. The first alleged, in addition to the citizenship of the parties as stated, the possession by the plaintiff on the seventeenth of June, 1880, of the claim, which is fully described, his right to its possession by virtue of its location pursuant to the laws of the United States and of the State, and the local rules and customs of miners in the district, and by virtue of priority of possession, the wrongful entry upon the premises by the defendants on the thirtieth of that month, their ousting the plaintiff therefrom, and unlawfully withholding the possession thereof from him, to his damage of \$50,000. The second count, in addition to the citizenship of the parties, the possession of the claim by the plaintiff, and the subsequent wrongful entry of the defendants, and their ousting him, alleged that the defendants worked and mined in the

¹ *Thompson v. Lee*, 1 M. R. 611; *Upton v. Larkin*, 15 M. R. 404; *Overman Co. v. Corcoran*, 1 M. R. 691; *Newbill v. Thurston*, 65 Cal. 419.

claim, and dug out and removed from it large quantities of gold and silver-bearing ore, of the value of \$50,000, to the damage of the plaintiff in that amount. The plaintiff, therefore, prayed judgment for the possession of the mining premises, and for damages of \$100,000.

The answer of the defendants contained a specific denial of the several allegations of the complaint, except that of the citizenship of the plaintiff, and, as to that, it averred their want of information, and demanded proof. And it set up the discovery of the claim in controversy on the thirtieth of June, 1880, by the defendants Boaro and Hull, to which they gave the designation of "The Johnny Bull Lode," and its definite location and record within ninety days thereafter, and their subsequent re-location of the claim, September 8, 1880, to avoid a conflict with an adjoining claim. They prayed, therefore, that they might be decreed its possession and ownership, in accordance with their rights.

On the trial the plaintiff produced evidence tending to show that on the seventeenth of June, 1880, one Thomas Carroll, a citizen of the United States, while searching, on behalf of himself and the plaintiff, also a citizen, for valuable deposits of mineral, discovered, on vacant, unoccupied land of the public domain of the United States, in the Pioneer mining district mentioned, the outcrop of a vein or lode of quartz and other rock bearing gold and silver in valuable and paying quantities; that by an agreement between him and the plaintiff, pursuant to which the explorations were prosecuted, all lodes and veins discovered by him were to be located, one fifth in his name and four fifths in the name of the plaintiff; that on the day of his discovery Carroll designated the vein or lode as the "Hawk Lode," and posted at the point of discovery a plain sign, or notice in writing, as follows:

"HAWK LODE.

"We, the undersigned, claim 1,500 feet on this mineral-bearing lode, vein or deposit.

"Dated June 17, 1880.

JOEL B. ERHARDT, 4-5ths,
THOMAS CARROLL, 1-5th."

That on the same day, at the point of his discovery, Carroll commenced excavating a discovery shaft, and sank the same to

the depth of about eighteen inches or two feet on the vein ; that on the thirtieth of the month, in the temporary absence of himself and the plaintiff, the defendant Boaro, with knowledge of the rights and claims of the plaintiff and Carroll, entered upon and took possession of their excavation, removed and threw away or concealed the stake upon which their written notice was posted, and, at the point of Carroll's discovery of the vein or lode, erected a stake and posted thereon a discovery and location notice as follows:

"JOHNNY BULL LODE.

"We, the undersigned, claim 1,500 feet on this mineral-bearing vein or lode, running six hundred feet northeast and nine hundred feet southwest, and 150 feet on each side of the same, with all its dips and spurs, angles and variations.

"June 30, 1880.

ANTHONY BOARO.

W. L. HULL."

The evidence also tended to show that Boaro and Hull entered upon the premises thus described, about July 21, 1880, and remained thereafter continuously in possession; that threats of violence to the plaintiff and Carroll, if they should enter upon the premises, or attempt to take possession of them, were communicated to Carroll as having been made by Boaro early in August following; that in consequence of such threats, and the possession held by Boaro, Carroll was prevented from resuming work upon and completing the discovery shaft, and from entering upon any other part of the lode or vein, and performing the acts of location required by law within the time limited. The evidence also tended to show that within ninety days from the discovery of the lode by Carroll, one French, on behalf of the plaintiff and Carroll, secretly caused the boundaries of the claim to be marked by six substantial posts, so as to include the place of discovery and the premises in controversy, and filed in the office of the recorder of the county a location certificate setting forth the name of the lode, the date of the location, the names of the plaintiff and Carroll as locators, and the course of the lode or vein; and giving such a description of the claim, with reference to natural objects and permanent landmarks, as would suffice to identify the same with reasonable certainty.

The evidence offered by the defendants tended to rebut that of the plaintiff, and to show that on the thirtieth of June, 1880, when Boaro entered upon the ground in controversy, he found nothing on the surface to indicate a vein or lode, or that any excavation had been made or stake erected, as alleged by the plaintiff, or that any portion of the ground claimed by the defendants had ever been previously located or claimed; that their discovery cut was commenced at a point thirty-five feet distant from the point described and claimed by Carroll as the point at which he had begun to sink the discovery shaft of the "Hawk Lode," and erected his stake and posted his notice, and that the top of the vein was at least four feet below the surface; that Carroll had abandoned all claim to the premises in controversy, and that his omission to perform the required location was due to such abandonment, and not to any threats of the defendants, or of any of them, nor to the occupation of the ground by Boaro and Hull, or either of them; that neither the plaintiff nor Carroll ever demanded possession of or asserted any title to the premises until the working of the claim by the defendants had shown it to be valuable.

The evidence of the defendants also tended to show that they had commenced work upon the claim about July 21, 1880, and sank and excavated an open cut, striking the vein or lode at the depth of ten feet or more, and exposed therein a vein of rock in place bearing gold and silver; that no mineral nor any indications of a vein or lode were found until they reached the depth of seven or eight feet; and that subsequently, and within the time limited by law, they marked the bounds of their claim on said lode, called by them the "Johnny Bull Lode," and recorded a location certificate, describing their claim by reference to natural objects and permanent landmarks, and complying in all respects with the requirements of the law.

The evidence being closed, the court was, among other things, requested to instruct the jury that from and after the date of the discovery by a citizen of the United States, upon vacant, unoccupied mineral lands, of the outcrop of a vein or body of mineral-bearing rock, the discoverer is entitled to the possession of the point at which he made his discovery,

and of such a reasonable amount of adjacent ground as is necessary or incidental to the proper prosecution of the work of opening up or exposing the vein or body of mineral-bearing rock to the depth and within the time required by law, and that to such extent he is protected by law in his possession for the period of sixty days from the date of his discovery. But the court refused to give this instruction, and the plaintiff excepted to the refusal. The court charged the jury, among other things, that it was in evidence, and seemed to be conceded, that the notice on the stake put up by Carroll contained no specification or description of the territory claimed by the locators, as that they claimed a number of feet on each side of the discovery, or in any direction therefrom, and "in this respect," said the court, "the notice was deficient, and under it the locators could not claim more than the very place in which it was planted. Elsewhere on the same lode or vein, if it extended beyond the point in controversy, any other citizen could make a valid location; for this notice, specifying no bounds or limits, could not be said to have any extent beyond what would be necessary for sinking a shaft;" and also, that to entitle the plaintiff to recover, "it should appear from the evidence that Boaro entered at the very place which had been taken by Carroll, because, as Carroll's notice failed to specify the territory he wished to take, it could not refer to or embrace any other place than that in which it was planted." To the giving of these instructions the plaintiff also excepted. The defendant obtained a verdict, and to review the judgment entered thereon the plaintiff brought the case here on writ of error.

ELIHU ROOT, for plaintiff in error.

T. M. PATTERSON and C. S. THOMAS, for defendant in error.

Mr. JUSTICE FIELD, after stating the case in the above language, delivered the opinion of the court.

As seen by the statement of the case, the court below, in its charge, assumed that the notice on the stake, placed by

Carroll at the point of his discovery, contained no specification or description of the ground claimed by the locators, because it did not designate the number of feet claimed on each side of that point, or in any direction from it. The court accordingly instructed the jury that the notice was deficient, and under it the locators could not claim any more than the very place in which the stake was planted, and that elsewhere on the same lode beyond the point of discovery any other citizen could make a valid location. In this instruction we think the court erred. The statute allows the discoverer of a lode or vein to locate a claim thereon to the extent of 1,500 feet. The written notice posted on the stake at the point of discovery of the lode or vein in controversy, designated by the locators as "Hawk Lode," declares that they claim 1,500 feet on the "lode, vein or deposit." It thus informed all persons, subsequently seeking to excavate and open the lode or vein, that the locators claimed the whole extent along its course which the law permitted them to take. It is, indeed, indefinite in not stating the number of feet claimed on each side of the discovery point, and must, therefore, be limited to an equal number on each side; that is, to 750 feet on the course of the lode or vein in each direction from that point. To that extent, as a notice of discovery and original location, it is sufficient. Greater particularity of description of a location of a mining claim on a lode or vein could seldom be given until subsequent excavations have disclosed the course of the latter. These excavations are to be made within sixty days after the discovery. Then the location must be distinctly marked on the ground, so that its boundaries can be readily traced, and, within one month thereafter, that is, within three months from the discovery, a certificate of the location must be filed for record in the county in which the lode is situated, containing the designation of the lode, the names of the locators, the date of the location, the number of feet claimed on each side of the center of the discovery shaft, the general course of the lode, and such a description of the claim, by reference to some natural object or permanent monument, as will identify it with reasonable certainty: Rev. St., § 2324; Gen. Laws Colo., §§ 1813, 1814.

But during the intermediate period, from the discovery of the lode or vein and its excavation, a general designation of

the claim by notice, posted on a stake placed at the point of discovery, such as was posted by Carroll, stating the date of the location, the extent of the ground claimed, the designation of the lode, and the names of the locators, will entitle them to such possession as will enable them to make the necessary excavations and prepare the proper certificate for record. The statute of Colorado requires that the discoverer, before a certificate of location is filed for record, shall, in addition to posting the notice mentioned at the point of discovery, sink a shaft upon the lode to the depth of at least ten feet from the lowest part of such shaft under the surface, or deeper if necessary, to show a defined crevice and to mark the surface boundaries of the claim. Before this work could be done by the plaintiff and his co-locator, the ground claimed by them was taken possession of by the defendants, the stake at the point of discovery, upon which the notice was posted, was removed, and Carroll was thereby, and by threats of violence, prevented from re-entering upon the premises and completing the work required to perfect their location and prepare a certificate for record; at least the evidence tended to establish these facts. If they existed—and this was a question for the jury—the plaintiff was entitled to recover possession of the premises. To the extent of 750 feet on the course of the lode on each side from the point of discovery he and his co-locator were entitled to protection in the possession of their claim. They did not lose their right to perfect their location, and perform the necessary work for that purpose, by the wrongful intrusion upon the premises, and by threats of violence if they should attempt to resume possession. As against the defendants, they were entitled to be reinstated into the possession of their claim. They could not be deprived of their inchoate rights by the tortious acts of others; nor could the intruders and trespassers initiate any rights which would defeat those of the prior discoverers.

The government of the United States has opened the public mineral lands to exploration for the precious metals, and, as a reward to the successful explorer, grants to him the right to extract and possess the mineral within certain prescribed limits. Before 1866 mining claims upon the public lands were held under regulations adopted by the miners themselves in

different localities. These regulations were framed with such just regard for the rights of all seekers of the precious metals and afforded such complete protection, that they soon received the sanction of the local legislatures and tribunals; and, when not in conflict with the laws of the United States, or of the State or Territory in which the mining ground was situated, were appealed to for the protection of miners in their respective claims, and the settlement of their controversies. And although since 1866 Congress has to some extent legislated, on the subject, prescribing the limits of location and appropriation, and the extent of mining ground which one may thus acquire, miners are still permitted, in their respective districts, to make rules and regulations not in conflict with the laws of the United States or of the State or Territory in which the districts are situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim: Rev. St., § 2324. In all legislation, whether of Congress, or of the State or Territory, and by all mining regulations and rules, discovery and appropriation are recognized as the sources of title to mining claims, and development, by working, as the condition of continued ownership until a patent is obtained. And whenever preliminary work is required to define and describe the claim located, the first discoverer must be protected in the possession of the claim until sufficient excavations and development can be made, so as to disclose whether a vein or deposit of such richness exists as to justify work to extract the metal. Otherwise, the whole purpose of allowing the free exploration of the public lands for the precious metals would, in such cases, be defeated, and force and violence in the struggle for possession, instead of previous discovery, would determine the rights of claimants.

It does not appear in this case, that there were any mining regulations in the vicinity of the "Hawk Lode" which affect in any respect the questions involved here. Had such regulations existed they should have been proved as facts in the case. We are, therefore, left entirely to the laws of the United States and the laws of Colorado on the subject. And the laws of the United States do not prescribe any time in which the excavations necessary to enable the locator to prepare and record a certificate shall be made. That is left to the legislation of the State, which, as we have stated, pre-

scribes sixty days for the excavations upon the vein from the date of discovery, and thirty days afterward for the preparation of the certificate and filing it for record. In the judgment of the legislature of that State this was reasonable time. This allowance of time for the development of the character of the lode or vein, does not, as intimated by counsel, give encouragement to mere speculative locations; that is, to locations made without any discovery or knowledge of the existence of metal in the ground claimed, with a view to obtain the benefit of a possible discovery of metal by others within that time. A mere posting of a notice on a ridge of rocks cropping out of the earth, or on other ground, that the poster has located thereon a mining claim, without any discovery or knowledge on his part of the existence of metal there, or in its immediate vicinity, would be justly treated as a mere speculative proceeding, and would not itself initiate any right. There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence. Then protection will be afforded to the locator to make the necessary excavations and prepare the proper certificate for record. It would be difficult to lay down any rules by which to distinguish a speculative location from one made in good faith with a purpose to make excavations and ascertain the character of the lode or vein, so as to determine whether it will justify the expenditures required to extract the metal; but a jury from the vicinity of the claim will seldom err in their conclusions on the subject.

This case, as appears by the record, is brought in the name of one of the locators, Erhardt, who owns only four fifths of the claim. But as a tenant in common with Carroll, he can maintain an action of ejectment for the possession of the premises, the recovery being not merely for his benefit, but for that of his co-tenant, who is equally entitled with him to the possession.

It follows from what we have said that

The judgment of the court below must be reversed, and the case remanded for a new trial, and it is so ordered.

G WILLIM V. DONNELLAN ET AL.

(115 U. S. 45. Supreme Court, 1885.)

¹ **Patenting the discovery shaft to third party.** The Cambrian lode was discovered in 1878, prior to the Mendota, but it had allowed that part of its location which included the discovery shaft to be covered by the patent applied for and issued to a third location. *Held*, that the Cambrian had by such fact no further validity as a mining location.

² **The patenting of the ground of a claim which includes its discovery shaft to an adverse location avoids the entire claim.**

Legal effect of location. A valid and subsisting location has the effect of a grant from the United States of the right of possession to the land located.

Must be valid against United States. A location, to prevail in a suit between the applying and the adverse claim, must be valid as against the United States as well as against the location with which it is in contention.

A location based on discovery can be made only by the discoverer or by one who claims under him; and if the discovery fails the location falls with it.

In error to the Circuit Court of the United States for the District of Colorado.

The suit below was an action to determine the adverse claim of the Cambrian lode against the Mendota lode. The facts are stated in the opinion of the court.

E. T. WELLS, for plaintiff in error.

ENOCH TOTTEN and C. H. TOLL, with whom was EDWARD O. WOLCOTT, for defendants in error.

WAITE, C. J.

¹ In the case of *The Little Pittsburgh Co. v. The Amie Co.* (5 McCrary, 298, decided in 1883), the Winnemucca had sold its discovery to a third party, who had then covered such discovery with the patent of another claim. The same court which was affirmed in the text held that this did not avoid the validity of the Winnemucca claim, but that holding would now seem to be perhaps untenable under the ruling of the text, and the reasoning in support of such ruling.

² *McGinnis v. Eghert*, 15 M. R. 329; *Armstrong v. Lower*, Id. 625; *Upton v. Larkin*, Id. 410, and S. C. on former appeal, 5 Mont. 600.

This is a suit begun July 7, 1881, under section 2326 of the Revised Statutes, to determine the rights of adverse claimants to certain mining locations. Donnellan and Everett, the defendants in error here, and also the defendants below, were the owners of the Mendota claim or location, and Gwillim, the plaintiff in error here, and the plaintiff below, the owner of the Cambrian. The two claims conflicted. The defendants applied, under section 2325, Rev. St., for a patent of the land covered by their location, and the plaintiff filed in due time and in proper form his adverse claim. To sustain this adverse claim the present suit is brought, which is in form an action to establish the right of the plaintiff to the premises in dispute, and to the possession thereof as against the defendants, on account of a "prior location thereof as a mining claim in the public domain of the United States."

The question in the case arises on this state of facts:

Upon the trial the plaintiff gave evidence tending to show that Isaac Thomas, on the sixteenth of May, 1878, discovered in the public domain, and within the premises described in the complaint, a vein of rock in place, bearing gold and silver, and sunk a shaft to the depth of ten feet or more, to a well-defined crevice, and located the premises under the name of the "Cambrian Lode," and performed all the acts required by law for a valid location. The plaintiff got his title from Thomas. In the answer of the defendants they set up title under the Mendota claim, located, as they allege, November 19, 1878. The plaintiff, in presenting his case to the jury, stated in effect that, after the location of the claim by Thomas, and before his conveyance to the plaintiff, one Fallon instituted proceedings to obtain a patent from the United States for another claim, including that part of Thomas' claim wherein was situated the discovery shaft sunk by him; that no adverse claim was interposed, and Fallon accordingly entered his claim and obtained a patent therefor; and before any new workings or developments done or made by Thomas upon any part of his claim not included in this patent, the defendants entered therein and located the same as a mining claim in the public domain. Upon this statement the court "ruled that inasmuch as that part of the claim of said Thomas wherein was situated his discovery shaft, had been patented to a third person, the

plaintiff was not entitled to recover any part of the premises, and instructed the jury to find for the defendants." This instruction is assigned for error.

Thomas made his location as the discoverer of a vein or lode within the lines of his claim. He made but one location, and that for 1,500 feet in length along the discovered vein. All his labor was done at the discovery shaft. There was no claim of a second discovery at any other place than where the shaft was sunk.

Section 2320 of the Revised Statutes provides that "a mining claim located after the tenth of May, 1872, * * * shall not exceed one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Section 2322 gives "the locators of all mining locations, * * * so long as they comply with the laws of the United States, and with the state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, * * * the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location." The location is made on the surface, and the discovery must be of a vein or lode, the top or apex of which is within the limits of the surface lines of such location. A patent for the land located conveys the legal title to the surface, and that carries with it the right to follow a discovered vein, the apex of which is within the limits of the grant downward, even though it may pass outside the vertical side lines of the location. The title to the vein depends on the right to the occupancy or the ownership of its apex, within the limits of the right to the occupation of the surface. This right may be acquired by a valid location and continued maintenance of a mining claim, or by a patent from the United States for the land.

To keep up and maintain a valid location \$100 worth of

labor must be done, or improvements made, during each year, until a patent has been issued therefor: Section 2324. By section 2325 it is provided that a patent may be obtained for land located or claimed for valuable deposits. To accomplish this, a locator, who has complied with all the statutory requirements on that subject, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of his claim, made by or under the direction of the surveyor general of the United States, showing accurately the boundaries of the claim, which must be distinctly marked by monuments on the ground. He must also post a copy of his plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to filing his application for a patent, and he must also file an affidavit of at least two persons that such notice has been duly posted. A copy of the notice must be filed in the land office. Upon the filing of such papers the register of the land office is required to publish a notice that the application has been made, for the period of sixty days in some newspaper to be by him designated as published nearest to the claim, and he must also post a similar notice for the same time in his own office.

If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, and that no adverse claim exists; and thereafter no objection from third parties to the issue of the patent shall be heard, except to show that the applicant has failed to comply with the law. Where an adverse claim is filed within the time, all proceedings upon the application in the land office, except in reference to the publication and proof of notice, are to be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It is then made the duty of the adverse claimant to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same to final judgment. After such judgment shall have been rendered, the party entitled to the possession of the claim, may, without further notice, file a certified copy of the judgment roll with the regis-

ter of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended, or improvements made thereon, and the description required as in other cases. When this has been done, and the proper fees paid, the whole proceedings and the judgment roll must be certified to the commissioner of the general land office, and a patent shall issue for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision that several parties are entitled to separate and distinct portions of the claim, each party may pay for his portion of the claim, together with the proper fees, and file the certificate and description by the surveyor general, and then the register must certify the proceedings and judgment roll to the commissioner, as in the preceding case, and patents shall issue to the several parties according to their respective rights: Section 2326.

A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as bar to the second: *Belk v. Meagher*, 104 U. S. 284. To entitle the plaintiff to recover in this suit, therefore, it was incumbent on him to show that he was the owner of a valid and subsisting location of the lands in dispute, superior in right to that of the defendants. His location must be one which entitles him to possession against the United States, as well as against another claimant. If it is not valid as against the one, it is not against the other. The location is the plaintiff's title. If good, he can recover; if bad, he must be defeated. A location on account of the discovery of a vein or lode can only be made by a discoverer, or one who claims under him. The discovered lode must lie within the limits of the location which is made by reason of it. If the title to the discovery fails, so must the location which rests upon it. If a discoverer has himself perfected a valid location on account of his discovery, no one else can have the benefit of his discovery for the purposes of location adverse to him, except as a

re-locator after he has lost or abandoned his prior right: *Belk v. Meagher, supra*.

In this action the plaintiff must recover on the strength of his own title, not on the weakness of that of his adversary. The question to be settled by judicial determination, so far as he is concerned, is as to his own right of possession. He must establish a possessory title in himself, good as against everybody. If there had not been a patent to Fallon, it would have been competent for the defendants to prove on the trial that when Thomas entered, Fallon held and owned a valid and subsisting location of the same property, and was the first discoverer of the lode, the apex of which was within the surface lines of Thomas' claim. Had this been done the location of Thomas would have been adjudged invalid, because the land on which his alleged discovery was made was not open to exploration, it having been lawfully located and claimed by Fallon. The admission made by the plaintiff at the trial, and on which the court acted in instructing the jury to find for the defendants, is the equivalent of such proof. It showed that after May 16, 1878, and before November 19, 1878, Fallon had applied for a patent of the land on which Thomas' alleged discovery was made, and where he had sunk his discovery shaft, that Thomas set up no adverse claim, and that in due time Fallon got his patent; and this because, under the law, the United States had the right to assume that no adverse claim existed. Having failed to assert his claim he lost his title as against the United States, the common source of title to all. The issue of the patent to Fallon was equivalent to a determination by the United States, in an adversary proceeding to which Thomas was, in law, a party, that Fallon had title to the discovery superior to that of Thomas, and that, consequently, Thomas' location was invalid. This barred the right of Thomas to apply to the United States for a patent, and, of course, defeated his location. From that time all lands embraced in his location not patented to Fallon were open to exploration and subject to claim for new discoveries. The loss of the discovery was a loss of the location. It follows that the court did not err in its instructions to the jury, and the judgment is consequently affirmed.

Affirmed.

HORSWELL V. RUIZ.

(67 California, 111. Supreme Court, 1895.)

Location to prevail against prior possession. One who goes upon United States mineral lands, and, without complying with the requirements of the law, or of local custom, works thereon, and relies exclusively on his possession and work, is not entitled to the possession as against another who subsequently peaceably locates a mining claim covering the same ground, and complies in all respects with the requirements of the federal and district mining laws and regulations; and the former is a trespasser from the time such second party has perfected his location and complied with the law.

End lines. The provision of the mining laws requiring the end lines of each claim to be parallel is merely directory, and no consequence attaches to a deviation from such provision.

Department 2. Appeal from the Superior Court of the County of Los Angeles.

The action was brought to recover possession of a mining claim and for an injunction against the removal of ore therefrom. Plaintiffs based their right of possession upon a location made on May 8, 1884. At that date the land in controversy was in the occupation of defendants, who were engaged in working it. The further facts appear in the opinion of the court.

HOWARD & ROBERTS, for appellant.

SMITH & HUFF, for respondent.

SHARPSTEIN, J.

The instructions given at the request of the defendants in some instances contradict those which were given at the request of the plaintiffs. For example, one instruction, given at plaintiffs' request, reads:

"You are instructed that if a party goes upon the mineral lands of the United States and work thereon, without complying with the requirements of any law, either federal, district

¹ *Sweet v. Webber*, 7 Colo. 443; *Garthe v. Hart*, 15 M. R. 492.

or local customs, and relies exclusively on his possession or work, and a second party locates peaceably a mining claim covering the same ground, and in all respects complies with the requirements of the federal and district mining rules, laws and regulations, then such second party is entitled to the possession of such mineral ground as against the party in prior possession, who is, from the time said second party has perfected his location and complied with the law, a transgressor."

At the request of defendants the following was given:

"The jury are instructed that, independently of any mining laws or customs, a party who first takes possession of an unclaimed mineral lode for mining purposes, may hold the same by actual work and occupation, to the extent of such work and occupation, as against all the world, except the paramount proprietor, provided that he neither claims nor holds in excess of that to which he would be entitled by virtue of a compliance with the mining laws."

The law is correctly stated in the one first given: *Morenhaut v. Wilson*, 52 Cal. 263; *Chapman v. Toy Long*, 4 Sawy. 28; *McCormick v. Varnes*, 2 Utah, 355; *Belk v. Meagher*, 104 U. S. 284; *Hopkins v. Noyes*, 4 Mont. 550; S. C., 2 Pac. Rep. 280.

In the *Eureka Case*, 4 Sawy. 302, the court, Field, J., delivering the opinion, said:

"The provision of the statutes of 1872, requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction."

The court was requested by plaintiffs to so instruct the jury, and refused to do so. We think the instruction should have been given.

The other exceptions are overruled.

Judgment and order reversed.

We concur: THORNTON, J.; MYRICK, J.

THE CONSOLIDATED REPUBLICAN MOUNTAIN MINING
CO. V. THE LEBANON MINING CO. OF NEW YORK.

(9 Colorado, 343. Supreme Court, 1886.)

Agent to convey afterward purchasing same property. One acting as the agent of another in perfecting title to a mining lode, who paid no part of the purchase price, owned no individual interest, and conveyed with no covenant of warranty, is not estopped, after his agency ceased, from conveying any other or different title which he thereafter acquired to the premises in controversy.

¹ **Nominal location without development.** A location made in 1855, under district rules, by posting a notice and filing a record, not followed by development, will not be upheld; if the rule allowed so loose a location it would be unreasonable.

Appeal from District Court of Clear Creek County.

R. S. MORRISON, JACOB FILLIUS and L. C. ROCKWELL, for appellant.

HUGH BUTLER and JOHN A. COULTER, for appellee.

HELM, J.

Browne acted as the agent of the Lebanon Company in perfecting title to the Powell lode. He paid no part of the purchase price, owned no individual interest, and conveyed with no covenant of warranty. He appears to have discharged his duties in perfect good faith. Therefore he was not estopped, after his agency ceased, from conveying to the Republican Company any other or different title which he thereafter acquired to the premises in controversy as a part of conflicting claims.

The so-called "Powell location," upon which appellee relies, was made in July, 1865. The Dryden and Rocky Mountain Mammoth locations, through which appellant claims, were made in September of the same year. The Powell was located simply by posting a notice and recording a certificate. No work of any kind whatever was done thereon at the time

¹ *O'Reilly v. Campbell*, 116 U. S. 418.

of posting the notice, or, so far as the record discloses, for at least six years thereafter. A shaft from two to three feet deep was sunk upon the Dryden, and one from eight to ten feet deep upon the Rocky Mountain lode, in the month of September, when their respective notices were posted and certificates filed for record. During the same fall the depth of the Dryden shaft was increased to six or seven feet.

In 1865 the manner of locating lode claims in Colorado was governed by miners' rules and customs; and, in order to constitute a valid location, compliance therewith was necessary: *Sullivan v. Hense*, 2 Colo. 424.

No objection was made or exception reserved, at the trial, by either party, to the method of proving these customs. Two witnesses testify that no work was then required, either to locate or to hold a claim; but one of them says, "As a general thing, we sunk a hole on every lode we recorded." Three witnesses swear that, under the prevailing customs, it was necessary (one says within thirty, another within sixty, days after discovery) to do some work in order to hold the lode.

Mr. Justice Field, speaking the unanimous view of the Supreme Court of the United States in *Jennison v. Kirk*, 98 U. S. 453, with reference to these miners' regulations and customs in California, uses the following language: "They all recognized discovery, followed by appropriation, as the foundation of the discoverer's title, and development by working as the condition of its retention." We think this remark equally true of the rules and customs existing in Colorado prior to statutory enactment on the subject. It is hardly possible that a custom ever prevailed with miners which recognized the right to possession of a lode or lode claim, for an indefinite period, without actual occupancy or some kind of development work. To say that merely posting a discovery notice on the crevice, and recording a certificate stating metes and bounds, constituted such an appropriation as, for a considerable period, prevented another from taking possession and developing the lode, is to recognize a custom that can hardly be considered reasonable—a custom contrary to the usual experience and practice in appropriations of the public domain and incompatible with ordinary sagacity and appreciation of justice among miners themselves.

The statute of 1861, relating to lode claims, which was still in force, in effect recognizes the fact that development work was required by the existing customs, for section 11 thereof protects the locations of soldiers in the army from forfeiture, because not "represented" (*i. e.*, occupied or developed), till the expiration of nine months after the date of their discharge from the service.

We are of the opinion that in 1865, to locate and hold a mining claim in Griffith mining district, development work after posting the discovery notice was requisite. No annual labor was required by statute for a number of years subsequent to that date, and we are not apprised by the record that an abandonment of either the Dryden or Rocky Mountain lodes at any time took place.

It is unnecessary to indulge in a further consideration of the points presented. The judgment of the district court will be reversed and the cause remanded.

Reversed.

GARTHE V. HART ET AL.

(73 California, 541. Supreme Court, 1887.)

Priority between locations. Where the first location of a mining claim is valid, and the parties have kept it so by doing what is required by the mining laws, a subsequent location, however regular in form, is of no effect.

¹**Distinction between first occupant, intruder and statutory locator.** A party who is in the prior possession of a piece of mining ground is entitled to maintain such possession as against a mere intruder, but not as against one who has subsequently located the same in compliance with the mining laws.

Parol agreement as to boundaries—Estoppel. In ejectment for a mining claim, where there is evidence tending to show an adjustment of boundaries between the parties by oral agreement, an instruction that if, under the oral agreement, improvements were made by one of the parties, this would work an estoppel, is erroneous, when there is no evidence that any such improvements had been made.

¹*Sweet v. Webber*, 7 Colo. 443.

Transfer of claim—Parcel. Under Civil Code Cal., § 1001, a writing is required to transfer a mining claim, and an oral agreement can not operate as a transfer.

Commissioners' decision. Department 1.

Appeal from Superior Court, Nevada County; J. M. WALLING, Judge.

CROSS & SIMONDS, for appellants.

JOHNSON & MASON and M. FARLEY, for respondent.

HAYNE, C.

Action of ejectment for a mining claim. Verdict and judgment for plaintiff. Defendants appeal.

1. The plaintiff gave evidence tending to show a location in 1881, and a subsequent location in 1884, the marking of the boundaries under these locations, and the recording of both claims. The statement does not show that \$100 worth of work was done each year as required by the act of 1872; but this defect in the evidence is not referred to in the specifications. The defendants gave evidence tending to show a valid location in 1880, the recording of the claim as required by a local regulation, the marking of sufficient boundaries, and the performance of the requisite amount of work each year. There is no evidence in contradiction of this. And if it be assumed that the plaintiff's proceedings were regular in all respects, it is manifest that the defendants had the earlier and better right. Where the first location is valid, and the parties have kept it so by doing what is required by the mining laws, a subsequent location, however regular in form, is of no effect: *Belk v. Meagher*, 104 U. S. 284; *Ross v. Richmond Co.*, 17 Nev. 56, 57. The verdict is, therefore, unsupported by the evidence.

2. The plaintiff gave evidence of an attempted location in 1879, and of acts tending to show a possession within the rule laid down in several cases. See *English v. Johnson*, 17 Cal. 109; *Table Mountain Co. v. Stranahan*, 20 Cal. 209; *Hess v.*

Winder, 30 Cal. 355. The court "struck out all evidence of this first location for the reason that it appeared that the same had not been made in compliance with law." It does not clearly appear whether this order was in reference to the "location" merely, or whether it extended to the possession also. But we think the order was in reference to the location, because the non-compliance with the mining law would not be a reason for striking out evidence of the possession.

Without saying whether the acts done were sufficient to constitute a possession, we think the court erred in its charge to the jury with reference to it. The charge was as follows: "In order to make a *valid location* of mining claims, the locator may adopt one of two courses. He may determine to locate his claim in accordance with law and customs. In order to get a title—a possessory title—in this way, he must conform to the requirements of law. * * * As I said, there is still another way by which a miner in this State may acquire a right to the possession of a piece of mining ground. It is *by taking possession of it, and clearly defining the boundaries so that they may be readily traced, and holding such possession—keeping such possession.*"

In the hurry of the trial the learned judge evidently overlooked the distinction between the right of a party in possession as against mere intruders, and his right as against one who has complied with the mining laws. Possession is good against mere intruders (*Attwood v. Fricot*, 17 Cal. 43; *English v. Johnson*, Id. 115; *Hess v. Winder*, 30 Cal. 355; *Golden Fleece Co. v. Cable Co.*, 12 Nev. 321, 322); but it is not good as against one who has complied with the mining laws (*Du Prat v. James*, 65 Cal. 556, 557, 562). We do not see that the error was cured by other portions of the charge. What is claimed as curing the error is the following: "Another question presents itself in this case which I will speak of shortly. Plaintiffs' claim in this case, so far as they are concerned, depends upon a location made by Mr. Penders and son in the year 1881, and a subsequent location made by Wiseman and others in 1884. Of course, if the location of defendants, to which I have already referred, was prior to that of plaintiffs, and they have complied with the requirements of the law since the date of that location, and the location itself was suf-

ficient, no rights could be acquired by plaintiff *under the subsequent location*." This instruction points to the first ground of plaintiff's right of which the court had spoken. It tells the jury, in substance, that if the defendants' location was prior to that of the plaintiff, and conformed to the requirements of the mining law, the plaintiff acquired no right "under the subsequent location." But it does not say that the defendants' location would prevail over the plaintiff's prior *possession*, which the court had already told the jury was one way in which the plaintiff could acquire a right to the premises in controversy. At most, the charge was misleading; and we think the jury must have been misled by it.

3. There was evidence tending to show an adjustment of boundaries between the parties by oral agreement. With reference to this the court instructed the jury, at defendants' request, as follows: "The jury is instructed that no estate or interest in real property (except a lease for not more than one year), nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered or declared, otherwise than by operation of law, or a conveyance or other instrument in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." This was undoubtedly correct. Before 1860 a verbal transfer was held to be good when accompanied with a change of possession: *Table Mountain Co. v. Stranahan*, 20 Cal. 208; *King v. Randlett*, 33 Cal. 321. In 1860 an act was passed with reference to gold mines (Laws 1860, p. 175), and afterward extended to all mines (Laws 1863, p. 98), which was construed to do away with oral transfers. See *Patterson v. Keystone M. Co.*, 30 Cal., 363; *Goller v. Fett*, Id. 484, 485; *Felger v. Coward*, 35 Cal. 652. Section 1091 of the Civil Code has been held to require a writing for the transfer of mining claims: *Melton v. Lambard*, 51 Cal. 259, 260.

The oral agreement, therefore, could not operate as a transfer. It seems to have been supposed, however, that what took place could have some effect by way of estoppel, and in this regard the court instructed the jury "that if they believe from the evidence in this case that the location of John W.

Hart and others was the first location which was good according to law; that afterward said Hart, Englebright, and their lessees, and J. W. Penders and his grantees, had a dispute as to the boundary line of the claim of each, and that it was finally understood and agreed by all parties that the line claimed by Penders should be treated and considered as the true boundary line between the two mining claims, and that thereupon the grantees of said Penders went in good faith to work upon the land before in dispute, *and made improvements thereon* under such agreement and understanding—then I charge you that, in determining the true boundary line between the parties, you may consider such conversation and agreements, if any there was, for the purpose of determining the true boundary line between the mining claims of each party.”

This was improper; if for no other reason, because there was no evidence of any improvement made “under such agreement and understanding,” or otherwise, and nothing which would give rise to an estoppel. We therefore advise that the judgment and order be reversed, and the cause remanded for a new trial.

BELCHER, C. C., and FOOTE, C., concurred.

By the Court: For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

OMAR ET AL. V. SOPER ET AL.

(11 Colorado, —, 18 Pacific Rep. 443. Supreme Court, 1888.)

¹ **Facts of the case**—Title affirmed to first occupant. The Golden Bell was discovered in February, 1883. Its location notice was placed and its shaft sunk the legal depth within the statutory period, but its record was not made within the time fixed by law. In April, the Verde was discovered and its location and record completed. Afterward, and after the lapse of the statutory period, the location certificate of the Golden Bell was recorded: *Held*, that the Golden Bell took the ground in conflict.

¹ *Contra, Garthe v. Hart*, 15 M. R. 492; *Horswell v. Ruiz*, Id. 488.

Effect of notice, to protect claim. A notice of discovery, posted by the discoverers of a lode of mineral at the point of discovery, containing a specification of the extent of the claim, although no such specification was required to be made by statute, will protect the full extent of the claim against an overlapping claim, during the period allowed by statute for sinking a discovery shaft, even though the boundaries had not been marked.

Erasing names and changing dates on notice. Where one of two discoverers of a lode of mineral acquired the interest of the other, erased the name of the latter from the discovery stake, and changed the date thereon from the time of discovery to the time of acquiring the whole interest, but remained in actual possession, continuing the development, and claiming in good faith to be the owner, he did not forfeit any rights acquired by the prior discovery.

Surveying in and recording over ground, no re-location. Under Gen. St. Colo., § 2411, providing for the re-location of abandoned lode claims by sinking a new discovery shaft or deepening the old one, fixing new boundaries or adopting the old ones, renewing the boundary posts, erecting a new location stake, and stating in the certificate of location that the whole or part is located as abandoned property, the surveying, staking and recording over the territory of the abandoned claim, does not constitute a re-location of that claim.

¹ Failure to record location certificate immaterial. The failure to record a location certificate within three months from the date of discovery of a lode of mineral, as provided by statute, does not inure to the benefit of the owners of an overlapping claim originating from a junior discovery, who made no attempt to re-locate the claim.

Claim to lode by discoverer—Evidence of good faith. Evidence that the discoverer of a lode of mineral had worked almost continuously on the lode from the time of discovery to the beginning of an action contesting his claim, corroborated by witnesses and by the amount of work performed, is sufficient to establish his good faith in making a claim to the lode.

² Locating over a working-prospect. Where defendants were in actual possession of a mining claim, and engaged in developing it, claiming to be the owners, plaintiff can not initiate a title thereto by a survey and the recording of a location certificate.

Where the claims of title to a mining claim set up by plaintiffs appear to be void in their inception, plaintiffs have no standing in court to question the validity of defendant's title.

¹ Held otherwise under same statute as to the time for sinking discovery shaft: *Patterson v. Hitchcock*, 5 M. R. 543. *Contra* generally, *Pelican Co. v. Snodgrass*, 9 Colo. 339.

² *Contra*: *Becker v. Pugh*, 15 M. R. 304; *Eilers v. Boatman*, Id. 463; *Armstrong v. Lower*, Id. 458; *Hopkins v. Noyes*, Id. 287.

Appeal from District Court, Boulder County.

This is a contention between claimants of the same mineral lode or vein; the appellants, who were defendants below, calling it the "Golden Bell," and the appellees, the "Verde." One of the appellants, Joseph Omar, with one Harry Clark, discovered the Golden Bell on February 24, 1883. They immediately posted a notice at the point of discovery, containing the name of the lode, the date of discovery, and that they claimed 1,000 feet northeasterly and 500 feet southwesterly, from the point of discovery, and 75 feet on each side of the vein, to which they signed their names as the discoverers. The evidence shows that they did considerable work within the sixty days next ensuing, and that their discovery shaft was sunk to the required depth within that period. The testimony of Omar and other witnesses shows this shaft to have been 10 feet in depth on the day the Verde was discovered. On April 4, 1883, the Verde was discovered by E. C. Bradstreet and L. E. Wallace, grantors of the appellees, at a point a few feet southerly of the territory claimed by Omar and Clark, as described in their discovery notice. Bradstreet and Wallace, upon uncovering the vein, also posted a discovery notice, claiming 1,400 feet northeasterly, 100 feet southwesterly, and 75 feet on either side of the crevice. This notice also contained the name given the lode (the "Verde"), the date of discovery, and was signed by the discoverers. Their claim, thus made, overlapped the vein and territory of the Golden Bell nearly 1,400 feet. On the 25th day of April next ensu

NOTE.—This case is not only contrary to the current of decisions, as the above notes indicate, but it unsettles all ideas of statutory law of Colorado since 1874. It has been very common for two or three prospectors to dig in the same vicinity, the others dropping out and yielding to the first discoverer as soon as he had finished his shaft within the sixty days and completed his staking and record within the three months allowed by law. If such first discoverer failed to complete either his shaft, his staking or his record within those periods, the first duly completed location and record were supposed to hold the ground.

This case now implies that if there were a prospect hole anywhere within the lines, such prospect hole must be re-located over in terms as a statutory re-location. Otherwise it is allowed at any time to complete itself and claim priority. Such inchoate claims have never heretofore been considered of sufficient dignity to require that attention.—R. S. M.

ing, another step in the history of this case occurred, upon which the Verde parties mainly rely in support of their claim to the disputed territory. It appears that Omar and Clark, discoverers of the Golden Bell, owned another claim called the "Mammoth," and that they exchanged their interests in these claims on that day, Omar taking Clark's interest in the Golden Bell, and Clark taking Omar's interest in the Mammoth. The irregular manner in which this exchange was made is relied upon by the appellees as an abandonment of the Golden Bell by its discoverers, and as letting in and validating the claim of the Verde parties. Omar describes the transaction thus: He says he worked right along on the Golden Bell from the 24th of February, 1883, until the 25th of April, 1883, and on that day made a trade with Clark. He suggested to him that they held two lodes together, and proposed that Clark take one, and he would take the other. Clark chose the Mammoth; and Omar thereupon erased Clark's name from the discovery stake of the Golden Bell, putting or leaving his own name thereon, and changed the date of the discovery from February 24, 1883, to April 25, 1883. This statement is corroborated by other witnesses. The testimony further shows that there was no cessation of work upon the Golden Bell, and that about two weeks after this transaction a rich strike of mineral was made upon it. On or about May 21st it was surveyed and staked. On May 22d Omar made out and signed a location certificate, which he filed for record on May 29th. This certificate gives as the date of discovery April 25, 1883. The Verde was surveyed and staked June 7, 1883, and the first location certificate was filed for record June 8th. On June 12th the claimants thereof brought suit against the claimants of the Golden Bell, alleging that the plaintiffs' grantors were legally seized and possessed of the Verde on the 4th day of April, 1883; the plaintiffs' ownership and right to possession of said lode through their grantors, and by compliance with the mining laws and regulations; the entry of defendants (the appellants); the ousting of the plaintiffs by them, etc. The defendants, claimants of the Golden Bell, answered the complaint, traversing its allegations; asserting title in themselves to the property sought to be recovered, by virtue of the discovery of mineral

thereon by Omar and Clark on February 24, 1883; the claim then made and posted by them; their compliance with the mining statutes; the transfer to Omar of the interest of Clark therein; the change thereupon made in the notice, and by the subsequent transfers of interests therein to co-defendants. The allegations of this answer were duly traversed by a replication filed by the plaintiffs. Two trials were had below, both resulting in favor of the plaintiffs, claimants of the Verde. On appeal from the last judgment, this court, at the last December term, reversed the judgment of the court below, but afterward granted a rehearing, which has been had. The opinion filed on the former appeal was withdrawn, and the opinion in this case was filed in its place.

Gen. St. Colo., § 2411, provides that the re-location of abandoned lode claims shall be by sinking a new discovery shaft, and fixing new boundaries, in the same manner as if it were the location of a new claim; or the re-locator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new or adopt the old boundaries, renewing the posts if removed or destroyed. In either case a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole or any part of the new location is located as abandoned property.

DOLLOFF & RITTENHOUSE, for appellants.

ALPHEUS WRIGHT and L. C. ROCKWELL, for appellees.

BECK, C. J. (*after stating the facts substantially as above*).

The first and second paragraphs of the petition filed for rehearing state the substantial grounds relied upon by the appellees in their arguments upon the rehearing. They are as follows: "(1) The decision seems to be based upon the ground that appellees' discovery shaft was sunk upon appellants' claim, a valid subsisting claim, and therefore void. The court erred in that the discovery of the Verde was made on unoccupied public domain, but it became, by reason of the survey, an overlapping claim on the Golden Bell. (2) The court

erred in deciding that the abandonment of the so-called Golden Bell by Omar and Clark, by making its date of discovery the 25th day of April, 1883, instead of February 24, 1883, did not inure to the benefit of the appellees." It is further urged in this petition, that the decision of this court in *Lebanon M. Co. v. Cons. Republican M. Co.*, 6 Colo. 380, holding "that entering upon premises in the actual possession of another, for the purpose of performing the acts necessary to constitute location and possession, amount only to trespass, and can not form the basis for the acquisition of title," is not applicable to the facts in this case, because the entry of appellees for the purpose of discovery of the Verde lode was not made on the Golden Bell territory, nor on any ground in appellants' possession. Upon allowing the rehearing, a question based, as was supposed, largely upon appellees' theory of the case, was submitted for argument. Counsel for the appellees, however, raised the objection that the question submitted was unfair to them, in that it assumed a state of facts which did not exist. They did not confine themselves to the discussion of this question, but, as they admit, devoted their principal arguments to the case as presented by the whole record. They also alleged errors and inconsistencies in the opinion filed, which were not pointed out in the petition for rehearing. But in view of the facts that the case must be remanded for another trial, and that important facts and points were misapprehended by the court on the former hearing, we deem it expedient that the opinion filed be withdrawn. The principal errors assigned upon the record of the trial below relate to instructions given the jury in behalf of the appellees, and the refusal to give instructions prayed by the appellants. The main issue involved in the case is whether the discoverers of the Verde (their discovery being upon the extension of the Golden Bell lode, but immediately outside that part of the Golden Bell vein and territory then claimed by its discoverers) could, in the manner here attempted, initiate a claim to the territory of the latter lode which might ripen into a valid claim in their favor through subsequent delinquencies on the part of the original discoverers of that lode.

The proposition of appellants, that the claim of Omar and Clark to 1,500 feet of the Golden Bell lode and territory, on

the 4th day of April, 1883, the day of the discovery of the Verde, was then a valid subsisting claim, is supported by high authority. This proposition is disputed by counsel for the appellees. They take the position that the discoverer of a lode can not keep other prospectors off his lode during the time allowed him by statute for sinking his discovery shaft, by inserting in his discovery notice, in addition to matters required by statute, the number of feet claimed upon the vein on each side of the point of discovery; also that such a notice does not render void an overlapping claim on the same vein and territory, made, within the period mentioned, upon a junior discovery. Upon these points the views of counsel are in conflict with the views of the Supreme Court of the United States. In the case of *Erhardt v. Boaro*, tried in the Circuit Court of the United States for the district of Colorado by Hallett, J., and afterward removed by writ of error to the Supreme Court of the United States, Judge Hallett held plaintiff's discovery notice defective because it did not state the length claimed upon the lode, nor the length claimed in either direction from the point of discovery. It was upon this state of facts he held the discoverer entitled to claim only the *possessio pedis* while sinking his discovery shaft, and that any other citizen might make a valid location, in the meantime, upon any other portion of the vein. But the effect of the decision is that, if the notice had specified the extent of the claim, the discoverer's right, to the full extent, would have been protected: 3 McCrary, 19; 8 Fed. 860. Mr. Justice Field, upon reviewing the case in the Supreme Court, says: "The written notice posted on the stake at the point of discovery * * * declares that they claimed 1,500 feet on the 'lode, vein or deposit.'" How such fact appears from the record in that case is not for us to inquire. The court held that, although the notice was indefinite in not stating the number of feet claimed on each side of the discovery, yet it would protect 750 feet on either side of the point of discovery, from the trespasses or claims of others, for the period of sixty days, the time allowed by the statute of Colorado for the sinking of a discovery shaft: *Erhardt v. Boaro*, 113 U. S. 527. Counsel in the present case raise the point that the statute does not require the discovery notice to contain such a speci-

fication. As we have seen, both Judge Hallett, of the District Court of the United States for the District of Colorado, and the Supreme Court of the United States, hold such to be the effect of our statute, if the extent of the claim is specified in the notice. While none of the cases heretofore brought before this court may have presented this identical point, our views of the proper construction of the State statute are in full accord with the foregoing decisions, concerning the effect of a legal notice posted at the point of discovery of a lode, which specifies the extent of territory claimed thereon on either side of the point of discovery. It is conceded, that, if the boundaries of the Golden Bell had been marked, no claim to any portion thereof could have been initiated until after a forfeiture had occurred. To hold that the miner, as soon as he discovers a lode, must immediately stake the territory which he is entitled to claim thereon, in order to protect it from the invasion and claims of other persons learning of his find, would be an unreasonable, if not an impossible, requirement. An attempt to do so would result, in many cases, in leaving the main portion of the lode outside the staked boundaries. The object of the statute in giving sixty days for sinking the discovery shaft, was evidently to afford the miner time to sink his shaft, and to ascertain the true course of his lode, when he would be qualified to mark its boundaries on the surface. When the legislative intent is clear, or can be reasonably inferred, it is held to be the duty of the courts to so construe the statute as to render it effective, if possible to do so under the rules of statutory construction *Simmons v. Powder Works*, 7 Colo. 285-289. To hold that the claim is protected throughout its whole extent, during this period, from invasion and adverse claims, by a notice which, in addition to the statutory requirements, shall specify the extent of territory claimed along the vein on both sides of the point of discovery, is both reasonable and equitable. It is likewise consistent with the spirit and policy of the statute, and a construction which renders it effective. Such a notice, properly made and posted, is an appropriation of the territory specified therein for the period of sixty days. It has been repeatedly held that only the unappropriated mineral lands of the United States are open to exploration and location. No one can, there-

fore, lawfully enter upon the territory so claimed, during the period named, for the purpose of initiating a claim thereto; and it necessarily and logically follows, from an application of the same rules and principles, that no one, during this period, can stand outside such appropriated territory, and in any manner initiate a claim thereto capable of being rendered valid in the future by the happening of fortuitous circumstances.

The intimation that the claim of Omar and Clark to the Golden Bell was not made in good faith is, in our judgment, without foundation, and is evidently based on a misconstruction of Omar's testimony. He swears that he worked almost continuously upon the lode from February 24th up to the commencement of this suit, and in this he is strongly corroborated by other witnesses, as well as by the amount of work which he performed upon the ground in controversy during this time.

But another position assumed in argument is that the Verde party made no claim to the territory in dispute until after Omar and Clark had abandoned their claim thereto, and until after the forfeiture became complete by the failure of the appellants to record their certificate of location of the Golden Bell within three months after the date of the discovery, February 24, 1883; that the owners of the Verde then appropriated the forfeited territory by extending their survey over the same. This extension of survey, so called, took in about 1,400 feet of the appellants' lode, including their discovery shaft and all the workings, and was made while the appellees were in actual possession. We observe, in the first place, that the record shows the claim of the appellees did not originate in this survey; and, in the second, that if it did it was invalid, for the reason that, under the mining laws and decisions, title to a lode in the actual possession of citizens who claim to own it, and who are engaged in developing it, can not be initiated by other persons by a survey, and the recording of a location certificate. The origin of appellees' claim dates from April 4, 1883, when their grantors uncovered the lode at a point immediately southerly and outside of the territory claimed by the discoverers of the Golden Bell. The notice then posted by the Verde discoverers claimed 1,400 feet "northerly," (which overlapped and included all but 100 feet of the Golden Bell), and 100 feet "southerly."

The Verde party denominate their survey, made June 7, 1883, a re-location of the Golden Bell, claiming that it was open to re-location at that time, by abandonment and forfeiture. If the lode was open to re-location at the date of this survey, no re-location was made or attempted in manner required by law. All that was attempted to be done was to perfect the location of the claim, previously made by the discoverers of the Verde, to the territory of the Golden Bell, by surveying, staking and recording a location certificate of that identical territory, all of which, as we have shown, was without warrant of law. These acts not only fall far short of the requirements of the statute concerning the re-location of abandoned lode claims, (Gen. St. p. 725, § 2411,) but do not even constitute an effort to comply with the statute.

The attempt to justify the steps taken by the Verde claimants for the acquisition of title to the Golden Bell, by reference to the statutes relating to location of cross-lodes, is equally abortive. It is illogical, there being no analogy between the two classes of locations, nor in the statute relating thereto. In the present case there is a single vein; and under a fair construction of the statutes, Federal and State, the portion thereof appropriated by the first discoverer is wholly withdrawn from interference or claim by any other citizen until some default is made. Such is not the law with regard to the location of cross-lodes. In such case there are two lodes, which either cross each other, or, approaching from different directions, unite at some point. In such cases the act of Congress (Rev. St. 2336) authorizes the subsequent locator to cross or enter upon the territory of the claimant of the other lode. In this class of cases a claim to a portion of the previously appropriated territory may be initiated, by authority of law, while it remains a valid, subsisting claim; but no such authority exists as to the former class.

Concerning the alleged abandonment of the Golden Bell by Omar and Clark on April 25th, a reconsideration of the point shows the claim was not abandoned by the proceedings which took place on that occasion. The purpose in view was merely an exchange of property, by which Omar should take Clark's interest in the Golden Bell, and Clark should take Omar's interest in the Mammoth lode. However irregular this trans-

action may have been, Clark's possession of the Golden Bell being surrendered to Omar, the intention of the parties was effectuated. It has been held that a written conveyance is not necessary to the transfer of a mining claim: *Mining Co. v. Taylor*, 100 U. S. 37; *Tunnel Co. v. Stranahan*, 20 Cal. 198. Omar, by erasing Clark's name from the discovery notice and remaining in actual possession, assumed full ownership of the claim. It is a settled principle of law that an abandonment of property is a question of intention. A transaction affecting property may be irregular; but if the owner does not intend to abandon it, and continues in possession, claiming in good faith to be the owner, no abandonment can take place: *Mallett v. Uncle Sam M. Co.*, 1 Nev. 188; *Myers v. Spooner*, 55 Cal. 257. The testimony as to Omar's intention in the matter is conclusive that he did not intend to abandon this lode. He continued the work of development as before, and about two weeks afterward struck rich mineral. We are also of the opinion that he did not forfeit any rights previously acquired by himself and Clark in the Golden Bell, by the changes made in the discovery notice at the time of the transaction referred to. If this claim subsequently became liable to re-location by reason of the failure of Omar and his co-owners to record their location certificate within the period of three months from February 24, 1883, the date of discovery, such default did not inure to the benefit of the appellees, since, as we have seen, they neither made nor attempted to make a re-location.

The result of this review of the case upon the whole record is substantially to narrow the issues to the single question whether a claim of ownership to mining territory which has been appropriated by the discoverers of a lode therein, made in the manner and under the circumstances above stated, can be initiated by other persons, before default or forfeiture on part of the discoverers, so as to make it capable of ripening into a valid title; and to answer the same in the negative. It appearing, then, from the record before us, that the claims of title set up by the plaintiffs below to the territory of the Golden Bell were void in their inception, both the claim there-to asserted upon the discovery of the Verde, and that alleged by way of re-location or extension of survey, the determina-

tion of this point is an end of the controversy as between the parties to this record. The plaintiffs, not being invested with any title, have no standing in court to question the validity of defendants' title. Mining titles can not be questioned collaterally: *McGinnis v. Egbert*, 8 Colo. 46. It follows from the points decided that the instructions given to the jury on behalf of the appellees were misleading and erroneous in important particulars. The first assumes that adverse rights to mining property may accrue or intervene before forfeiture; the fifth, that all the rights of the discoverers of the Golden Bell, acquired by discovery and posting of notice on February 24, 1883, were lost by changing the names of the claimants, and the date of the discovery notice; the sixth, that the appellants are estopped, by their certificate of location, from claiming a discovery of their lode on the 24th day of February. All these instructions are erroneous and misleading as between the parties to this controversy, for the reasons above given. The points decided will enable the trial court to correctly instruct the jury concerning the legal propositions involved in the action. Ordered that the judgment entered herein on the 4th day of January A. D. 1888, be vacated and set aside; that the opinion filed be withdrawn, and that the judgment of the court below be reversed, and the cause remanded.

1. A location in excess of the legal length is void only as to the excess: *Richmond Co. v. Rose*, 114 U. S. 576. See *Hauswirth v. Butcher*, 4 Mont. 299; *Leggatt v. Stewart*, 15 M. R. 358.

2. Neglect to set one of the four corners does not justify an absolute instruction that the claim is void: *Anderson v. Black*, 70 Cal. 226.

3. Monuments called for in a location certificate will be presumed to be natural objects and permanent monuments until the contrary appears: *Garfield M. Co. v. Hammer*, 8 Pac. 153.

4. A tree is a valid monument of location: *Quimby v. Boyd*, 6 Pac. 462.

5. Discovery is a condition precedent to location: *Upton v. Larkin*, 15 M. R. 404.

6. An unstaked claim (prior to 1872) with its notes calling for different corners than its true course, can not, by proving up, be made to invalidate a *bona fide* staked claim afterward located upon the same vein: *O'Reilly v. Campbell*, 116 U. S. 418.

J. H. RUSSELL, Respondent, v. WM. CHUMASERO ET
AL., Appellants.

(4 Montana, 309. Supreme Court, 1882.)

A lode location certificate must contain a sufficient description, by reference to natural objects or permanent monuments. But it is not for the court, from the description, to say that its calls are not proper monuments. This fact is open to evidence as to the nature of the objects called for.

A location certificate calling only for its own stakes and for adjoining claims, may be good if such claims are found on the ground with definite corners and boundaries.

Appeal from Third District, Lewis and Clarke County.

The point in the case was upon the exclusion of the plaintiff's declaratory statement or location certificate, which the court recites in its opinion.

E. W. TOOLE & J. K. TOOLE, for appellants.

CHUMASERO & CHADWICK and SANDERS & CULLEN, for respondent.

WADE, C. J.

Plaintiff, to maintain his action, offered in evidence the record of his declaratory statement and location of the Alta Lode claim, which is in the words and figures following, to wit:

"DECLARATORY STATEMENT.

"*Alta Lode.*

"This lode is situated in Ten-mile Mining District, Lewis and Clarke County, Montana Territory, discovered July 26, 1876, by J. H. Russell, and he hereby gives notice that he has located the above named lode under the provisions of the act of Congress, May 10, 1872, and claims 1,300 feet westerly, and 200 feet easterly, from discovery; thence to stake A, 300

¹ *Duryea v. Boucher*, 67 Cal. 141.

feet; to stake B, 200 feet; to stake C, 390 feet; to stake D, 1,500 feet; to stake, 600 feet; to stake A, 800 feet; bounded on the north by the south lines of the Mammoth and Free Speech lodes, and on the south by the north lines of Eureka and Fairview lodes;" which was properly verified.

Defendants objected to the introduction of this declaratory statement in evidence, which was sustained, and exception saved, and this action of the court is the error complained of. The act under which that location was made, requires that the location be distinctly marked on the ground so that its boundaries can be readily traced, and that the record thereof shall contain the name of the locator, the date of the location, and such a description of the claim located, by reference to some natural object or permanent monument, as will identify the claim.

We held, in the case of *Hauswirth v. Butcher*, 4 Mont. 299, that such a location carried with it a grant from the government to the person making the same, and that the record must contain such a description of the claim located, by a reference to some natural object or permanent monument, as will identify it. We affirm that decision. The record of location must contain a reference to such objects or monuments. But it is not for the court to say, by merely looking at a record or declaratory statement, what are or what are not permanent objects or monuments. That is matter of proof. A stake or a stone of the proper size and properly marked, may be a permanent monument. A declaratory statement or a record thereof with a reference to permanent stakes or monuments which did not exist as a fact on the ground, would not be good, while a defective description in the record or declaratory statement might be cured if the stakes or monuments on the ground identified the claim.

The location in question was bounded on the north by the Mammoth claim, and on the south by the Eureka and Fairview claims. It was not for the court to say, by simply looking at this declaratory statement, that the boundaries of these claims did not sufficiently describe and identify the claim of the plaintiff on the northern and southern boundaries. These claims may have been held by patents from the government, with corners and boundaries so definite and certain as to leave

no question concerning the location of the plaintiff's claim. Whether this was so or not was matter of proof, and the plaintiff ought to have had an opportunity to have supported and made certain his declaratory statement by competent testimony.

Judgment reversed and cause remanded.

DRUMMOND ET AL. V. LONG ET AL.

(9 Colorado, 538. Supreme Court, 1886.)

¹ **Description required by statute.** The Federal and the State law are substantially the same in requiring that the location certificate of a mining claim must contain such a description as will identify the claim with reasonable certainty.

Natural objects and permanent monuments. The intention of the statute is to give one seeking to identify a recorded claim something in the nature of an initial point from which to start. The identification must be by reference to some natural object or permanent monument.

Location certificate held void for uncertainty, set forth at length in the statement.

Error to District Court, Ouray County.

Robert Long, deceased, the original defendant below, made application at the proper land office for a patent to the Portland lode. James A. Drummond and others, plaintiffs below, owners of the Amphitheatre and Mountain Bell lodes, filed an adverse claim, and brought this suit in pursuance thereof. The Portland lode was located in 1875. The Amphitheatre and Mountain Bell lodes were located in 1878, and embrace within their boundaries certain of the territory included in the Portland location. Upon the trial the defendant introduced in evidence the following certificate of location:

"Know all men by these presents, that we, R. F. Long and M. V. Cutler, of the county of La Plata and Territory of Colorado, claim, by right of discovery and location, 1,500 feet, linear and horizontal measurement, on the Portland lode, along

¹ *Upton v. Larkin*, 15 M. R. 404.

the vein thereof, with all its dips, variations and angles, together with 150 feet in width on each side of the middle of said vein at the surface, and all veins, lodes, ledges and surface ground within the lines of said claim; 1,050 feet on said lode running southeast from the center of discovery shaft, and 450 feet running northwest from center of discovery shaft, said discovery shaft being situate upon said lode, within the lines of said claim, in Uncompahgre mining district, county of La Plata, Territory of Colorado, on the southwest side of Mount Hardin, in Portland gulch, about 1,500 feet north of the Hawk Eye lode. Said Portland lode was located on the thirtieth day of August, 1875. Date of certificate, October 4, 1875.

[Signed]

"R. F. LONG.

"M. V. CUTLER."

The jury found for the defendant. Writ of error to the Supreme Court.

L. B. WHEAT, for plaintiffs in error.

MARKHAM, PATTERSON & THOMAS, for defendants in error.

ELBERT, J.

The certificate of location of the Portland lode was admitted in evidence on the trial in the court below, over the objection of the plaintiffs that it did not comply with the requirements of section 2324 of the Revised Statutes of the United States, in that it did not contain such a description of the claim located, by reference to some "natural object or permanent monument," as would identify it. Section 2399, Gen. St. 722, provides that the discoverer of the lode shall record his claim in the office of the recorder of the county, and section 2400 requires that the certificate of location thus recorded shall contain, among other things, such a description as shall identify the claim with reasonable certainty. In this respect the requirement of the Federal and State law may be said to be substantially the same. That degree of certainty with which the final survey for a patent fixes the *locus* and boundaries of the subject-matter of the grant is not required in the

3. A record must call for such monuments as will identify the claim:
Gilpin M. Co. v. Drake, 8 Colo. 586.

4. A certified copy is evidence without accounting for the original:
Garfield M. Co. v. Hammer, 8 Pac. 153.

5. A record calling for two mountain peaks as monuments is good:
Craig v. Thompson, 16 Pac. 24.

45.

JAMES K. PARDEE, Respondent, v. HUGH T. MURRAY
ET AL., Appellants.

(4 Montana, 234. Supreme Court, 1882.)

Admissions as to the supposed course or dip of an undeveloped lode are mere matters of speculation, and are not (estopping) evidence.

Possession of the surface gives (constructively) possession of all veins apexing within the surface lines, including such parts of veins as extend on the dip beyond such lines.

¹**No adverse possession by secret mining.** There can be no valid adverse possession initiated by striking a vein which apexes in another's ground by means of a shaft sunk on the perpendicular, when the working of the lode so struck is unknown to its owners.

²**In the case of cross-lodes the elder location takes all the mineral within the space of intersection—with right of way only, to the owner of the cross-vein. And if the claimant of the cross-lode take the ore in the space of intersection he is a trespasser.**

A default at time of final judgment against co-defendants who fail to plead, is not ill-taken nor too late.

Appeal from Second District, Deer Lodge County.

HIRAM KNOWLES, THOS. L. NAPTON and SANDERS & CULLEN,
for respondent.

E. W. & J. K. TOOLE, for appellants.

WADE, C. J.

This controversy, as shown by the pleadings and testimony, arose over the identity of certain quartz lodes, the plaintiff claiming the possession of the Salmon and Cliff Extension lode claim, situate near Philipsburg, Deer Lodge county, he being the lessee of Holland and Estell, who purchased the claim in 1873, and after the commencement of this action received a government patent therefor; and the defendants basing their right upon their location and possession of the Sharktown and Scratch-All claims. The answer of defendants denies the

¹ *Eilers v. Boatman*, 15 M. R. 462.

² The Supreme Court of Colorado (but on a case argued on behalf of the cross-lode only) have held to the contrary: *Branagan v. Dulaney*, 8 Colo. 408.

possession of plaintiff, but the testimony conclusively shows, and without question or dispute, so far as the same appears in the transcript, that the plaintiff, at the time of the grievances complained of, was, and that for a long time prior thereto his lessors had been, in possession of the surface ground of the Salmon and Cliff lode claims. The answer also denies that the defendants ever entered upon the Salmon and Cliff claims, or that they ever mined within the limits thereof, and avers that ever since the 9th day of February, 1875, they have been in possession of and working the Sharktown and Scratch-All claims, and therefore alleges that plaintiff's action is barred by the Statute of Limitations of February 9, 1865, and January 11, 1872. The replication of plaintiff admits the location of the Sharktown and Scratch-All claims, but alleges that the defendants, since the 9th day of February, 1875, have been working on the Salmon and Cliff Extension. The location of the Sharktown and Scratch-All was were not in question. There was no controversy concerning them, and could have been none. Their location was admitted in the pleadings, and any testimony concerning such location was properly excluded from the evidence.

This seems to be the state of facts in the case: The defendants entered upon their own grounds, and outside the surface boundaries of the plaintiff's claim, and sunk a perpendicular shaft, and struck a vein of quartz beneath the surface, and the question at issue was whether this vein belonged to and formed a part of the Salmon and Cliff Extension lode, and upon this issue the jury found for the plaintiff, and that it did. Upon this issue, testimony as to when defendants commenced upon their claims, or under what claim of title, or how much money they had expended thereon, or when they first commenced work, was wholly immaterial, after the admission in the pleadings of the location of their claims. Nor would it have been competent to have proved the declarations of Holland and Estell, lessors of plaintiff, as to the extent or limits of the Salmon and Cliff vein, providing the extent and limits of the same, at the time they made any declarations, because of want of development, were entirely unknown. Such declarations at such a time could have been nothing more than mere speculation, and wholly incompetent for the pur-

pose for which they were offered. Neither would the opinion of the respondent in 1876, as to the location of the Scratch-All claim, or the opinion of any witness as to the dip or direction of the ore in any other veins, make any difference.

The possession of the respondent was sufficient to maintain this action. He had possession of the surface ground, and such possession gave him possession of all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of the surface location: U. S. R. St., § 2320. Possession of the surface of a mining-claim location is possession of all veins, lodes and ledges, the tops or apexes of which are inside the surface lines, although such veins, lodes and ledges, as they go downward, may extend outside such surface lines; and possession of the surface ground protects such veins, lodes, and ledges from the operation of the Statute of Limitations. Therefore, before the defendants could set up any adverse claim to the Salmon and Cliff Extension vein, they ought to have shown that they were in possession of the same at the surface. No adverse possession could become operative by going outside of its boundaries and sinking a shaft upon what they claimed as another location, and striking the Salmon and Cliff Extension vein on its dip, and outside of its surface lines, no matter how long continued, if unknown to respondent and his lessors. In such a case the statute would begin to run only from the time it became known to the Salmon and Cliff owners, their predecessors, or assignees, that the defendants had entered into the possession of the vein under ground and outside of its surface boundaries. Such owners would have no right to enter upon the defendants' ground, or into their shaft or works, and therefore no means of knowing the extent of the defendants' possession, or what titles they might be claiming by virtue thereof. Adverse possession, in order to ripen into a title, must be open, notorious and under a claim of right. The defendants set up no claim to the Salmon and Cliff Extension. They deny that they ever worked upon the same. They claim title by virtue of the Sharktown and Scratch-All locations, and allege that all their work was

done upon such locations. They therefore can claim nothing by virtue of adverse possession of the Salmon and Cliff Extension. They declare that they held no such possession, and claim no interest in that vein. Under these averments in their answers they can claim nothing by adverse possession. Their pleading must not be contradictory or inconsistent. Their testimony must not contradict their averments. After having denied in their answers that they ever had possession of the Salmon and Cliff Extension lode, it was no error for the court to refuse to admit testimony in their behalf that they had taken forcible possession thereof.

If, under the state of circumstances disclosed in this case, the defendants might have availed themselves of the Statute of Limitations, they have not so pleaded the same as to become entitled to the benefits thereof. They claim under the statutes of February, 1865, and January, 1872, which were repealed by the act of February 16, 1877.

The defendants also claim by virtue of a cross-vein. All competent testimony on this issue seems to have been fairly submitted to the jury. In such a case priority of title governs, and the prior location is entitled to all the ore or mineral contained within the space of intersection, but the subsequent location has the right of way through the space of intersection, for the purpose of the convenient working of the mine. U. S. Rev. St., § 2336. If a vein with a prior location crossed another, such vein would not disturb the possession of the subsequent location, except as to the extent of the cross-vein, and would entitle the prior location to the ore and mineral contained in the space of intersection. If, with a subsequent location, the locator would be entitled only to a right of way to the extent of his cross-vein, for the purpose of working his mine, and to no other right, and if he should take the ore contained in the space of intersection, he would be a trespasser, against whom the prior locator in possession of the surface ground might maintain an action of trespass.

Judgment affirmed.

HYMAN V. WHEELER ET AL.

(29 Federal Rep. 347. U. S. Circuit Court, District of Colorado, 1886.)

An impregnation, to the extent to which it may be traced as a body of ore, is a vein, lode or ledge, under section 2322, Rev. St. U. S., giving to the owner of a mineral claim, containing the top or apex of a vein, lode or ledge, the right to follow the same beyond the vertical side lines, but between the vertical end lines, whether the ore is separated from the country rock by planes or strata of that rock visible to the eye, or is determinable in other ways, as by assay and analysis.

A body of mineral, or mineral-bearing rock, in the general mass of country rock, so far as it may continue unbroken, and without interruption, is a lode, whatever the boundaries may be.

With well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode.

Pocket in the country. If the entire mass of limestone in which a body of ore lies has been mineralized in the same way as the body of ore, and to some extent, and the body of ore is a casual concentration of unusual richness, the body of ore is not a lode.

¹ **Mineralized stratum along planes of contact.** Strata lying along the plane of contact between blue and brown limestone, if mineralized to the extent of showing valuable minerals, and distinguishable from other parts of the country rock by carrying ore, and by association with the plane of contact, constitute a lode, as far as the strata lying on or near the contact may show ore in appreciable quantities.

² **Identity of lodes—Persistence of ore.** In determining whether a lode extends from defendants' claim to plaintiff's location, and has its apex therein, the persistence of the ore through these and the intervening claims is of little weight, unless there is evidence tending to show a crevice of continuous ore or mineralized rock; with such evidence it is of considerable weight.

Claimant must show apex. Plaintiff's location and defendants' location are some distance apart, and they overlap so that the north end of plaintiff's location is nearly parallel to defendants' location for about the distance of 750 feet. In asserting a right to follow a vein or lode on its dip beyond his own location and into that of defendants, plaintiff must show the outcrop or apex of such vein or lode to be in his own location throughout the ground in controversy, being the extent of the locations parallel to each other.

Record of another action admissible as against a party. Where one of the defendants in action has been a plaintiff in another action in which his claim was opposed to his claim in the case at bar, the complaint, order of court, and affidavits offered on behalf of plaintiff, are admissible as admissions of said defendant, as against him, but against none of his co-defendants.

¹ *Mt. Diablo Co. v. Callison*, 9 M. R. 616.

² *Iron S. Co. v. Cheesman*, 9 M. R. 552 (affirmed 116 U. S. 529); *Sterens v. Williams*, 1 M. R. 557; *Leadville Co. v. Fitzgerald*, 4 M. R. 300.

Witness—Criticism of, from the bench. In regard to a certain witness, the court instructed the jury as follows: "I can scarcely believe that any jury would be willing to accept the testimony of a witness who would declare, upon the stand, that he had made statements in a general way, and for business purposes, outside of the court room, and with a view to defraud people with whom he was carrying on negotiations, in opposition to his testimony on the stand."

This was an action of ejectment, brought by David M. Hyman, of Cincinnati, Ohio, as the owner of the Durant mining claim, situate on Aspen mountain, near the town of Aspen, Pitkin county, Colorado, against J. B. Wheeler, of New York City, and his co-defendants, as claimants of the Emma mining claim, situate on the west slope of the same mountain, on the ground that the defendant had sunk a shaft from the surface, and, by means of drifts, levels, and underground workings, had broken into, and unlawfully taken possession of, that portion of the Durant vein which, having its outcrop and apex within the Durant surface boundaries extended downward vertically, passes out of the Durant side lines on the west, and into and through that portion of the Emma claim lying between vertical planes extended downward through the Durant end lines, produced westerly, in their own direction, across said Emma claim.

The Durant claim was discovered and located by W. S. Clark, Charles Bennett, A. C. Fellows, et al., August, 1879. The Emma claim was located in August, 1880. July 9, 1879, Phil. Pratt and Smith Steele discovered the Spar claim, which adjoins the Durant upon the north, and is situated upon the same mountain and ledge; made their discovery workings upon an outcrop of copper-stained heavy spar, carrying silver ore; and pointed out to the Durant locators a similar heavy spar outcrop upon that ledge as a point at which the Durant locators should do their discovery work, and, for that purpose, withdrew the Spar stakes fifty feet down the hill. Lying to the west of the Spar and Durant claims, and upon the slope of West Aspen mountain, and partly below the Durant and partly below the Spar, are the Washington No. 2, Emma, Aspen, and Vallejo mining claims.

The workings on the Spar claim, which are run from the surface at the point of discovery, upon the contact between blue

limestone (a carbonate of lime) and brown limestone, called "dolomite," (a carbonate of lime and carbonate of magnesia,) extend in ore from the surface in the Spar mine to the lowest workings in the Aspen, and are connected with all the underground workings in the Vallejo, Washington No. 2, Aspen, and Emma claims. At a point 750 feet south of the Spar discovery, upon the Durant claim, an incline called the "Durant Incline," has been run a distance of 600 feet, and is connected with the underground workings in the Spar, Washington No. 2, Vallejo, Emma, and Aspen claims, by means of the Washington No. 2 side-line drift, run on the line between the Emma and Washington No. 2, the Emma Central, or No. 6 drift, run about the center of the Emma claim, and the Compromise drift, run on the line made by compromise, as a boundary between the west side line of the Emma claim and the east side line of the Aspen claim. All these workings are run along the line of contact between what is known as the blue lime and the brown lime or dolomite, and which is called by the plaintiff the "vein." The Spar and Durant claims are so located that their east side lines fall to the east of the crest of Spar ridge, and of the contact between the blue and brown lime which outcrops immediately east of and along said crest, and their west side lines fall to the west of the crest of said Spar ridge.

In November, 1883, the defendant Wheeler brought a suit in chancery against the claimants of the Washington No. 2 lode, being John Jordan and others, which suit is No. 1386 on the United States Circuit Court docket, in which he applied for an injunction, claiming that there was a vein having its apex in the Spar claim, and so far departing from a perpendicular in its downward course as to pass beyond the west side line of the Spar, into and through the territory lying below, known as the Washington No. 2 claim, and that the owners of said Washington No. 2 claim had sunk to and were removing ore from said Spar vein.

On the hearing of the application for an injunction the defendants in that case contested the existence of the apex of the vein within the Spar claim above the point where they were working, and asserted that the apex which existed for some distance in the Spar claim passed out of its side lines, and

ran across the Washington No. 2 claim. Wheeler, the plaintiff in said case, filed a large number of affidavits in support of his position, among them those of W. B. Devereaux, W. J. H. Miller, George W. Lloyd, Phil. Pratt and James Lyon, in which he showed the existence of a fissure or contact fissure vein, with selvage, slickensides and other characteristics, with well-defined walls—the hanging wall being carbonate of lime or calcite, the lower and impure magnesian limestone or dolomite; and that the apex extended from the 1001 claim on the north end of the Spar, through the said Spar, into, through and beyond the Durant on the south; and that the same vein was disclosed in the Durant incline that was shown in the Spar and Washington No. 2 claims. On the hearing in this suit Wheeler obtained an injunction, and in the present case the bill, affidavits and injunction were admitted in evidence on behalf of the plaintiff as declarations of Wheeler.

In the trial of the present case the plaintiff's witnesses testified to the existence of a vein extending from the Spar discovery into and through the Washington No. 2 claim, the Vallejo and Emma, with the outcrop and apex thereof extending from the Spar discovery southward to the mouth of the Durant incline, and thence south to the Visino tunnel and incline, being works upon the Durant claim, thus covering all that portion of the Emma mining claim in controversy in the case. They also testified that the same vein was disclosed in the Durant incline from where it was started upon the Spar outcrop, through its entire extent, to the point where it entered the Compromise drift, and in various small drifts run for short distances from the side of said incline, at numerous points; also in the Visino workings; in certain apex cuts or openings made by the plaintiff along the surface of the Durant claim for the purpose of disclosing and proving up the apex or outcrop of the vein, as well as in drifts and levels in the Durant claim, and in the underground workings of the Spar, Washington No. 2, Vallejo, Emma and Aspen claims, and in the drifts connecting them with the Durant incline; that the ore body or vein was found on the plane of contact between the brown and blue lime, the gangue consisting of heavy spar, occurring at all points in the working as a nucleus of the vein, associated with disintegrated, ground up, or crushed and mineralized por-

tions of the brown lime, called "short lime," and also copper, iron, silica, lead, and silver ore, having a clay selvage and slickensides, and portions of the walls striated, with the ore occurring at places in such a manner as to disclose a banded structure characteristic of fissure veins; and that while, in a considerable portion of the workings, ore remained, this was ore which had not been removed, because at the time said work was done, it was not commercially valuable; and that this ore was found both upon the foot and hanging walls, with these walls, however, clearly defined and distinctly disclosed at numerous points.

Numerous lines of assays and analyses were made and introduced in evidence, showing the composition of the vein matter and the walls, supporting the position maintained by the plaintiff. Models, maps, photographs and samples were also introduced as a portion of the plaintiff's evidence. The defendants contended, and many of their witnesses testified, that there was no vein; that the ore occurred in the general mass of the mountain, all of which had been mineralized, and was in the form of impregnations, which occurred without regularity or defined boundaries, gradually fading out into the surrounding rock or limestone, its presence only being detected by means of assays; that silver could be found on the surface, and almost anywhere in the mountain, and that the heavy spar found at the line of contact, and in the mineral claimed by the plaintiff to be the vein, was without significance, being indiscriminately scattered over the mountain, and through it, imbedded in brown and blue lime; that the Durant incline did not always follow the contact, and was for a distance of almost 100 feet run through barren rock; that for a considerable distance in said incline the contact was tight or blended, with nothing in the nature of ore in it; that the apex cuts did not disclose the outcrop of a vein, and only showed a contact between brown and blue lime, and sometimes not even that; that the Visino workings and Durant incline were not run upon the same contact. They further contended that, in order to fall within the provisions of section 2322 of the Revised Statutes of the United States, a vein must be a fissure in the earth's crust, filled with mineral matter foreign to the walls, and that the walls must be well defined and easily distinguished, and

that the vein filling could not be of the same material or character as the walls, or a part of them. They also claimed that the ore in the workings connected with the Durant incline was not confined to the contact between the brown and blue lime, but was found indiscriminately in each of these limes, and at considerable distances from the plane of contact, and, save by assay and analysis, was in no way distinguishable from the pure brown and blue lime; and in support of this claim instanced drifts claimed to be run in the brown and bluelime. Plaintiff, in rebuttal, claimed that the drifts followed stringers or spurs of ore from the vein, and were, therefore, only the usual accompaniments of fissure veins.

The witness Thompson, for the defendants, was confronted on his cross-examination with two reports made and circulated by him in an effort to sell the Camp Bird mine, situated upon the same mountain, to a considerable distance south thereof, in which he had asserted the existence of a vein upon the same contact which was found in the Spar, Durant, Emma and other claims. He had sworn in his examination in chief that there was no vein on the mountain. The last of these two reports was signed December 10, 1886; the first was issued early in the year. Upon cross-examination he said that these reports were made for the purpose of deceiving people into putting their money into the Camp Bird; that he knew they were false when he issued them; that he was not in this country for his health, and that such things had to be done in mining business, although known to be false.

The case was called December 6, 1886, and the jury returned a verdict December 23, 1886.

H. M. TELLER, C. REED, J. W. TAYLOR and C. J. HUGHES, JR., for plaintiff.

PATTERSON & THOMAS, DOWNING & FRANKLIN and A. W. RUCKER, for defendants.

HALLETT, J. (*charging jury*).

The part which I have to perform in this extended discussion is very brief. I will read to you, first, section 2322 of the

Revised Statutes of the United States, upon which the controversy in this suit is founded:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode or ledge situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, 1872, so long as they comply with the laws of the United States, and with State, Territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction, that such planes will intersect such exterior parts of such veins or ledges."

The proposition asserted by the plaintiff under that statute is well stated in an instruction asked by the defendants, which I will read to you:

"The proposition asserted by the plaintiff in his complaint is that there is a vein or lode within the limits of the Durant mining claim, which commences at the north end line, near the center of the claim, the top or apex of which extends thence, in a southerly direction, approximately through the center of the claim; that this vein or lode, as shown by the workings of the Durant claim, extends on its dip in a westerly direction, through the Durant claim, and to and beyond the west side line of said claim, thence into the Emma claim, and that the said vein or lode is the part of the vein or lode which they allege exists in the said Emma claim; that the plaintiff may recover, it is essential that every one of his propositions be maintained by a preponderance of evidence in the case. Unless it shall appear to you, by a preponderance of the evidence, that what is asserted by the plaintiff to be his

vein extends to and across the west side line of the Durant claim, he can not recover; and unless it shall be made to appear by a preponderance of the evidence that the alleged Durant vein or lode extends into and is a part of the vein or lode existing in the Emma claim, then he can not recover; and unless it shall appear to you that the alleged vein has its apex extending from the Durant incline, in a southerly direction, through the Durant claim, at least so far as the so-called apex cuts have been excavated, then he can not recover."

The last clause is modified by a statement in what I have written to the effect that it is necessary that the existence of the outcrop and apex should be co-extensive with the Emma location; that is, it should appear as far south as the Emma location goes.

Upon the general propositions contained in that instruction, I have the following to say:

Within the limits to which the investigation of facts before a jury is necessarily confined, this case has been fully and elaborately presented for your consideration. Every fact which may aid you in the decision of the matters in issue is brought to your attention as fully and completely as possible. With models and views of the mountain, and maps of all openings in the mine, with ores from the mine and rocks of the different strata, and assays and analyses showing their value and composition, and by the testimony of many witnesses, the parties have done all in their power to enlighten you in respect to the nature of the controversy. The number of witnesses called by the parties was governed by rule of court, so that one could have no advantage over the other in that respect; and the witnesses are arrayed in point of numbers on party lines, half on one side and half on the other, so as to produce an embarrassing conflict of testimony. Such conflict is not an unusual feature of testimony in a mining suit. They have become so common and general that many thoughtful men entertain doubts as to the value and efficiency of trial by jury in such cases. If a given number of witnesses of fair character and intelligence can be produced at the will of the parties for or against any proposition that may arise in a mining controversy, without reference to the truth of the matter, of course the result of such an investigation can not be very

satisfactory. But if we look to the circumstances upon which such conflicts arise, we shall find that they are not wholly due to partisan zeal. To determine the contents of a mountain from what may be seen on the surface, and in some slight explorations under ground, is a matter of such difficulty that differences of opinion, even as to facts open to observation, are to be expected. Openings under ground, however extensive, when considered in their relation to the great recesses of a mountain, are scarcely more than a vestibule or point of entrance to the unexplored interior. And in openings under ground, investigation proceeds slowly and laboriously, with many tests which often fall short of the truth. Every one understands the liability to error and mistake in inspecting underground works, and how the rock or ore which appears to one to be of a certain class may to another present a different aspect; so that, in the field of observation, there is ample scope for differences of opinion which, in themselves, do not impeach the candor and fairness of witnesses. These conflicts of testimony, and the possibility or probability of error in the testimony of any witness, are worthy of attention in any effort that may be made to harmonize the testimony, and determine the controlling facts.

In the books, and among miners, veins and lodes are invested with many characteristics; as that they lie in fissures or other openings in the country rock; that they contain materials differing, or in some respects corresponding with the country rock; that they are of tabular form, and of a banded structure; that some one or several things are commonly associated with the valuable ores; that they have selvages and slickensides in the fissures and openings, and the like. It is not necessary to enumerate all the features by which they are known. Some of these characteristics are said to be common to all lodes and veins, and others of rare occurrence; but, in general, witnesses will take up one or more of them as essential features of a lode or vein, and declare the fact upon the presence or absence of such elements. A party seeking to prove the existence of a lode or vein will naturally rely on any such characteristic that he can find in the ground in dispute, and call witnesses who will accept that feature as establishing the fact. The party opposed will seek to disprove the

Washington and Spar claims was received to explain its general character, and as having some bearing upon the question of its existence and extension into the territory of the Durant location to the south.

The character of a vein or lode, and the country adjoining, can be better and more satisfactorily shown through extensive works than in a small area. What weight shall be given to the fact of the persistence of the ore throughout these claims is to be determined by the jury. Without something in the plaintiff's claim to show a crevice or continuous ore or mineralized rock, it would be of little value. In connection with evidence showing, or tending to show, some such fact, it may be of considerable value. If you find from the evidence that the ore in the several works is in the form of a brecciated vein in a fissure between walls, the extension and continuance of such fissure throughout the territory mentioned by the witnesses may be more readily predicated than the same fact as to the ore or mineralized rock only. Upon that point a part of the charge in the case before mentioned is fully applicable to this case:

"To determine whether a lode or vein exists, it is necessary to define those terms, and as to that it is enough to say that a lode or vein is a body of mineral or mineral-bearing rock, within defined boundaries, in the general mass of the mountain. In this definition the elements are the body of mineral or mineral-bearing rock, and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if, in such fissure, ore is found, although at considerable intervals and in small quantities, it is called a lode or vein."

In that view of the evidence, it may be important to consider and determine whether there is a fissure exposed in the several openings of the mine as asserted by the plaintiff; and.

if you find that such fissure exists, whether it is practically continuous and unbroken between strata of blue and brown lime from an outcrop in the Durant claim to the Emma ground below. With such a fissure extending in that way, even if it be narrow, and carry ore only slight in quantity, and at considerable intervals, the case of the plaintiff may be regarded as established. If, however, you find that the body of ore developed in the several works constitutes a lode, as already defined, but without a fissure inclosing it, your only guide in ascertaining its extent will be the mineralized rock, which, in that view of the testimony, is taken to be ore. I have explained to you fully that the strata lying along the plane of contact between the blue and brown lime, if mineralized to the extent of showing value in silver, and distinguishable from other parts of the mountain by carrying ore, and by association with the plane of contact, may constitute a mineralized zone. In that state of facts, the contact of blue and brown lime furnishes a guide for the miner in his search for ore, in so far as the strata forming the contact are mineralized. Such a zone is clearly a lode, within the meaning of the law, extending as far as the strata lying on and near the contact may show ore in appreciable quantities.

If the evidence proves the existence of such a lode, the question will be whether it extends throughout the Durant incline, manifested by ore in appreciable amounts in the strata of the contact. A barren contact between blue and brown lime will not suffice to establish a lode in that incline; it must carry ore to some extent, and of some value. To sum up briefly the matters before you, the body of ore exposed in the works of the mine is to be regarded as a lode, within the meaning of the law, unless the whole mass of limestone in which it is found has been mineralized in the same way as the body of ore, and to some extent, and this is a casual concentration of unusual richness.

If it is a "lode," under this definition, its existence in the Durant claim, and extension therefrom to the Emma ground, is the next question in order. That question may be considered, in the *first* instance, with reference to the existence or absence of a fissure in the Durant incline and elsewhere, marking the course and continuance of the lode. *Secondly*, if

there is no fissure, is the contact between blue and brown lime mineralized in the manner and to the extent before explained? The affirmative of the first and second or third of these propositions establishes the plaintiff's case. The negative of the first, or of the second and third, determines the case for defendants.

Much comment has been made at the bar on the testimony relating to an outcrop or apex of a lode in the Durant location. The plaintiff must show an apex or outcrop within his claim as far south as the Emma claim extends, which is, I believe, about 750 feet. Upon the testimony of the defendants' witnesses alone, there is scarcely room for doubt as to the presence of an outcrop or apex in the mouth of the Durant incline; and it is said that the ore extends down the incline for a distance of 50 or 60 feet. Whether the apex and outcrop extends further south in the Durant claim is for your consideration upon all the evidence.

There are certain propositions offered by defendants touching the previous suit of *Wheeler v. Markell and others*, which appear to be correct. The court has admitted, for the consideration of the jury, the bill of complaint, the order of the court and certain affidavits offered in behalf of the plaintiff, in the case of *J. B. Wheeler* (one of these defendants) v. *C. Markell* (one of these defendants) *et al.* That controversy was one between the Spar and the Washington No. 2 mining claims, adjoining the Durant mining claim upon the north, and they were admitted as giving evidence of some admissions upon the part of the defendant Wheeler of the existence of a vein within the Spar lode mining claim. You are specially instructed that the same can not be considered by you, nor can they have any weight against any of the defendants, except defendant Wheeler, and, therefore, can be admitted only as admissions against him. In order to construe them correctly, you should consider the character of the ground, and the amount of openings, at the time of the filing of these affidavits, and the much larger amount of ground opened at the present time; and you will also consider that said Wheeler did not prosecute the suit to a final determination, but dismissed the same of his own volition.

In the matter of the admission of the bill of complaint, the

order of the court, and the affidavits of W. B. Devereux and others in behalf of the plaintiff herein, the same were admitted as admissions made by J. B. Wheeler in 1883, upon the subject of the existence of a vein in the Spar claim and in the Durant. These affidavits are not to be taken as evidence given in this case by those who made the affidavits in support of the claim of the plaintiff that there is a vein in the Durant ground which extends into, and is a part of, the body of mineral in the Emma claim; but, grouping them all together, they amount simply to the admission by J. B. Wheeler himself of the existence of a vein in the parts of the territory mentioned in the bill of complaints and affidavits, and this admission is not at all conclusive of the proposition contained in the bill of complaint and affidavits, but they are to be taken as evidence, so far as such an admission may be considered important in determining the affirmative or the negative of the question in dispute in this suit, and in determining whether or not a vein exists in the Durant as claimed by the plaintiff, and extends into the Emma ground, and is a part of the lode or vein claimed to exist there. The said admissions of the defendant Wheeler can only be considered in connection with all the other evidence in the case, and, unless the plaintiff shall establish everything essential to his recovery by a preponderance of the evidence, the said admissions being a part of the evidence in his behalf, it will be your duty to render a verdict for the defendants.

Upon the testimony, gentlemen, I do not intend to make any observations. It has been fully discussed by counsel before you. But the position of the witness Thompson in this controversy, which he assumed when on the stand, seems to call for some notice in a public way. It is most extraordinary that any witness of fair intelligence and ability should put himself in the position which he assumed on the stand; and had it appeared to me to be a case in which the act was criminal, I certainly should have taken steps to cause him to be punished for it. But, under the circumstances of this case, and so far as it may affect the issues in this case, you will know how to apply the remedy. I can scarcely believe that any jury would be willing to accept the testimony of a witness who would declare upon the stand that he had made statements in a gen-

eral way, and for business purposes, outside of the court-room, and with a view to defraud people with whom he was carrying on negotiations, in opposition to his testimony upon the stand. It certainly is a very remarkable instance of the impudence and courage of a man who is destitute of principle.

Upon the other testimony in the case I have, as I said before, no observations to make. You have given patient attention and consideration to it so far, and I trust that in the decision of the case it will receive the consideration to which the importance of the case entitles it.

The verdict was for the plaintiff.¹

1. Ore bodies formed off from the fissure do not form separate veins: *Tombstone M. Co. v. Way Up M. Co.* 1 Ariz. 426.

2. Liability of veins to open and contract; failure to find mineral for short distance; effect of considered: *Iron Silver Co. v. Cheesman*, 116 U. S. 530.

3. The outcrop of a lode on the hill side, the stratum dipping at a slight angle, is not such an apex as gives the right to follow on the dip: *Duggan v. Darey*, 26 N. W. 887.

4. Where two veins unite going down, the oldest location, not the oldest patent, takes the ground below the plane of union: *Champion M. Co. v. Cons. Wyoming Co.*, 16 Pac. 513.

¹ A second trial was demanded under the statute but the case was in the meantime compromised.

TRIHAY V. BROOKLYN LEAD MINING CO.

(11 Pacific Rep. 612. Supreme Court of Utah, 1886.)

¹ **Plaintiff was injured by a scale while timbering a fresh stope.** The evidence tended to show that the ground required immediate timbering, as the stope was broken, to keep it safe: *Held*, sufficient proof of negligence to sustain a verdict.

Ordinary and extraordinary risks. Where an employe contracts to perform, for extra compensation, hazardous service, he only contracts to take upon himself the risks incident to the employment. He does not agree to take extraordinary risks, growing out of the negligence of the employer, to which his attention had not been called.

² **Safe place to work—Delegation of duty.** An employer owes to his servant the duty of furnishing him a safe and proper place in which to pursue his work, so far as he is able to do so by the exercise of ordinary care and diligence; and this duty he can not delegate to an agent or servant, so as to excuse himself as to responsibility to one who has been injured by its non-performance.

Notice to foreman. It is no defense that the injury was occasioned by the negligence of a foreman, who had the entire charge of the mine, as notice to him was notice to the company.

DICKSON & VARIAN, for plaintiff, the respondent.

BENNETT, HARKNESS & KIRKPATRICK, for defendant, the appellant.

POWERS, J.

This is a case in which the plaintiff recovered damages in the lower court, arising from the alleged negligence of his employer. In his complaint he alleged "that the defendant is a corporation, doing business and having its principal place of business in the Territory of Utah; that the defendant, on the twenty-eighth day of August, 1885, was, and for a long time prior thereto had been, engaged in mining in Bingham mining district, in said Territory, and was, and had been, as aforesaid, there working and operating the Brooklyn mine; that on said day, and for a long time prior thereto, the defendant employed, and had in its service, a large number of miners, timber-men and others, engaged in sinking shafts, running

¹ *James v. Emmett M. Co.*, 21 N. W. 361; *Pantzar v. Tilly M. Co.*, 100 N. Y. 368.

² *Jones v. Florence M. Co.*, 28 N. W. 207.

drifts, stopes and inclines, and excavating and removing earth, ore and rock; that the plaintiff, on the last day aforesaid, and prior thereto, was employed by and in the service of the said defendant as a timber-man, and in the said service was required to enter newly-worked drifts, stopes and ground for the purpose of securing the same with braces and timbers, for the protection of said mine, and the security of the officers and servants of defendant." It is further alleged that "on the twenty-eighth of August, 1885, and for some weeks prior thereto, the defendant, by its servants and employes, was, and had been, working and excavating in a certain stope on or under the underground level of said mine, known as the '1100-foot level;' that the ground in which said work was had was very heavy and dangerous, and, in order to secure the same from falling and caving in, it was necessary that the same should be braced and timbered as fast as the excavation progressed, and it was the duty of said defendant to cause said stope to be so braced and timbered as the said work of excavation progressed." It is further alleged "that on the twenty-seventh day of August, 1885, and during all the night of said day, and the morning of said twenty-eighth of August, the defendant caused said stope of said mine to be worked and excavated, and large quantities of earth and rock to be removed therefrom." It is further alleged that "the defendant negligently and carelessly, and in violation of its duty in that behalf, failed to cause said stope to be braced and timbered when it had been newly worked; and negligently and carelessly, and in violation of its duty in that behalf, suffered and permitted the same to remain in an unsafe and dangerous condition; that on the said twenty-eighth day of August A. D. 1885, while said stope was unsafe, and in the condition aforesaid, the plaintiff was required and directed by the defendant to enter said stope, and to brace and timber the same; and thereupon the plaintiff, having no knowledge of the dangerous and unsafe condition thereof, did enter the same, for the purpose of timbering and bracing aforesaid, in accordance with the directions of the defendant, and immediately large quantities of earth and rock fell down from the upper part of said stope, and upon plaintiff," and he sustained the injuries complained of.

The answer of defendant, among other things, denies the

alleged negligence of defendant, and alleges that said stope was not dangerous to timber and secure, with the exercise of ordinary care in the business of timbering; and that plaintiff had full knowledge of the condition of said stope, and the ground thereof, before he entered the same; and that the injuries received by him in said stope were wholly caused by his own negligence in the performance of his duties, and by his negligence in proceeding with the work of timbering said stope, and not from any negligence or want of care of the defendant.

The plaintiff was a timber-man, and, on the morning of the twenty-eighth of August, while he was engaged in his duties in the stope, on the 1100-foot level, a block of lead fell upon him from the side of the stope, causing the injuries complained of.

Upon the conclusion of the plaintiff's testimony the defendant moved for a nonsuit on the following grounds: (1) The testimony shows no negligence on the part of the defendant (2) If there was any negligence on the part of defendant, there was such contributory negligence on the part of the plaintiff as to preclude a recovery. (3) If there was any negligence, it was that of fellow-servants of the plaintiff. (4) If the direction of the foreman contributed to the accident, no such cause of action is alleged in the complaint.

Among the errors assigned is the overruling of this motion by the court.

We think the motion for a nonsuit was properly overruled. There was evidence tending to establish the fact that it was necessary to closely timber the mine at the point where the accident occurred, in order to make it safe, and that this was not done; that the foreman exercised control of the timbering, and that the plaintiff only carried out his instructions; that the plaintiff relied upon the foreman's judgment and direction in doing the work; that he had never been in the stope where the accident occurred and did not know that it was dangerous ground; that his attention was not called to the fact that the ground had become extra dangerous through neglect in timbering; that he executed his work with due care; that the ground was very dangerous, and known to be by the foreman. These facts legitimately tended to establish the plaintiff's case, and they were proper to go to the jury.

But it is contended that the plaintiff undertook, for an extra compensation, to perform a hazardous service. That is true, but he only contracted to take upon himself the risks incident to the employment. He did not agree to take extraordinary risks, growing out of the negligence of the company, and to which it had not called his attention. The employer owes to his servant the duty of furnishing him a safe and proper place in which to prosecute his work, so far as he is able to do so by the exercise of ordinary care and diligence. This duty he can not delegate to an agent or servant, so as to excuse himself, or so as to escape responsibility to another, who has been injured by his non-performance. The degree of care exacted of the employer is in proportion to the hazards and perils of the service in which his servants are engaged. The more hazardous the employment, the more watchful and careful should the master be to guard against the danger or injury to his servants through insecurity or want of safety in the premises in which his servants are required to prosecute their work. The court, in this case, left the question of negligence and of the want of due care, on the part of both parties, clearly and properly to the jury.

Among other things, the court charged the jury that—

“In determining whether or not there was negligence on the part of the defendant, or on the part of the plaintiff and defendant, it is proper to consider various things, so far as they are shown by the evidence—such as whether the injury was the result of accident incident to the business, and occurring without negligence on the part of the defendant; the time when, and the manner in which, the danger was developed; the length of time it had existed; whether or not it was visible to either or both parties, or could, by reasonable care, have been discovered by either or both parties; the relative opportunity and duty of each party to discover the danger; and the relative and respective duties of the parties to guard against or remove the danger, when known, if it was known at all.

“A timber-man in a mine takes all the usual and ordinary risks of the work which arise out of the nature of the business, and are likely to happen in the performance of his duties, and such risks are deemed included in the agreed rate of his compensation for the services; and, if you find that the plaintiff

was injured only by the ordinary risk of his employment, the defendant is not liable for the injury. The plaintiff could not shift to the defendant the whole duty of providing for his safety, but it was his duty to be vigilant and careful in his own behalf, and to use a degree of care proportioned to the degree of danger in the ordinary discharge of his duties; and, if you find the injury is the result of his failure to use ordinary care, or that by omitting to use ordinary care he contributed in any material degree to the injury, the defendant is not liable. If you find that the liability of the rock, which hurt the plaintiff, to fall, was not visible on inspection, and could not with reasonable care have been observed, the defendant is not liable.

"If you find that the rock which caused the injury was loosened and fell in consequence of the plaintiff's work in preparing to set timbers, the defendant is not liable. If you find that the danger of said rock falling, arose from recent excavation of the ground in the ordinary course of mining, and that such danger was visible, and that the defendant did not know of the danger, and sufficient time had not elapsed so that, by ordinary care and inspection, the defendant should have ascertained the danger, the defendant is not liable. If the danger to which the plaintiff was exposed was visible, and was equally visible to the plaintiff and defendant, and that in the ordinary course of his duties the plaintiff had opportunity, equal or superior to those of the defendant, to ascertain the danger, and failed to do so, or, knowing the danger, omitted to guard against it, the defendant is not liable.

"If you find that the plaintiff's duties, as timber-man, were to follow up the miners, and timber such ground as needed timbering, then the nature of the employment implied that ground which needed timbers was unsafe or likely to fall or cave without timbers, and the plaintiff assumed all the ordinary risks of the work, and of timbering ground from time to time opened; and the defendant is not liable unless the injury to the plaintiff resulted from an unusual danger, known to and concealed by defendant, or which the defendant should have known and disclosed, and at the same time unknown to the plaintiff and not discoverable by him by the use of ordinary care; and if you find that the foreman, Legg, told the plaintiff, shortly before the accident, to brace the rock which fell,

such direction was notice that he considered it unsafe without such bracing, and your verdict should be for the defendant.

"The plaintiff alleges in his complaint, and it is admitted to be the fact in this case, that on the twenty-eighth of August, 1885, when he was injured, and prior thereto, he was employed by, and was in the service of, the defendant, the Brooklyn Lead Mining Company, in the capacity of a timber-man; and that in the said employment it was his duty to enter newly-worked drifts, stopes and ground, for the purpose of securing the same with braces and timbers, for the protection of the mine, and the security of the employes of the defendant; and you are instructed that the plaintiff assumed all the ordinary risks and dangers incident to his said employment; and, if you find that the injury to the plaintiff resulted from such ordinary risks or dangers, the defendant is not liable.

"A servant or employe must possess a fair measure of skill for the service he undertakes, and he should inform himself of the duties and dangers peculiar to his work. It is his duty to go about his work with his eyes open. He may not wait to be told to use care for his safety. He must act affirmatively, and use ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly and heedlessly to his work, when there is danger. He must use care to inform himself. He is held by his contract of hiring to assume the risks of injury from the ordinary dangers of the employment; that is to say, from such dangers as are known to him or are discernible by the exercise of ordinary care on his part, and such as are incident to the work, though unknown and not discernible. If he knew the danger, or, by ordinary care on his part he could have discovered it, the employer is not liable for injury resulting therefrom; and if you find that the injury to the plaintiff resulted from a danger incident to his employment as timber-man, and that such danger was either known to him, or, by the exercise of ordinary care on his part he could have discovered it, the defendant is not liable and your verdict should be for the defendant.

"If you believe, from the evidence, that when the foreman, Legg, and the plaintiff, were in the stope together on the twenty-eighth of August, a short time before the accident, Legg called the plaintiff's attention to the shattered or loose

condition of the rock inside of the stope, from which the rock subsequently fell on the plaintiff, and directed or suggested to the plaintiff that he had better put in a brace to hold up and secure said rock while he was engaged in timbering the stope, and that plaintiff neglected to do this, then your verdict must be for the defendant.

"If you find from the evidence, that just before the accident to the plaintiff, on the twenty-eighth of August, McLaurén, the miner who was working in the stope with Johnson, called the attention of the plaintiff, Trihay, to the shattered or loose condition of the rock in the side of the stope, and suggested that he, the plaintiff, should either brace up said rock or take it down before he began to timber said stope, and that plaintiff neglected to do so, he assumed the risk of his work, and your verdict must be for the defendant.

"If you believe from the evidence that the plaintiff, Trihay, at and before the time of the accident, on the twenty-eighth of August, either knew, or, by the exercise of ordinary care and diligence could have known, of the shattered and unsafe condition of the rock in the side of the stope at and near the places where he was engaged in putting in the stull, which rock subsequently fell on him, and that he neglected to take any precautions against the danger of its falling while he was so engaged, your verdict should be for the defendant.

"If the jury believe from the evidence, that the injury to the plaintiff, Trihay, was alone the result of the carelessness or negligence of the timber-man, McGivney, or of the miners on the night shift in the back-stope, or of the miners Johnson and McLaurén, or either of them, then they are the fellow-servants of the plaintiff, and the defendant is not liable to the plaintiff for such negligence."

This charge certainly protected the defendant in all its rights, and left the case squarely to the jury, as a question of fact. That the case was properly left to the jury we have no doubt. In the case of *Cunningham v. Union Pac. Ry. Co.*, 7 Pac. Rep. 797, which we think rules this case, we said: "In this case there was evidence from which negligence upon the part of the defendant might be inferred. At least, there was sufficient to submit to the jury. The coal which fell was left overhanging the gangway some three feet. This the foreman

of the mine knew, but he took no steps to remove it, or to protect it by timbers. He was aware that coal hanging from the roof, while it might seem safe one moment was liable to fall the next. It was his business to report the condition of the mine from day to day to the superintendent, and it will be presumed that he did his duty. It was therefore proper for the jury, in view of all the facts, to find whether the defendant had been negligent or not. Under our system of jurisprudence, it is the province of the jury to pass upon the facts. It is not only their privilege, but their right, to judge of the sufficiency of the evidence introduced, to establish any one or more facts in the case on trial. The credibility of the witnesses, the strength of their testimony, its tendency and the proper weight to give to it, are matters peculiarly within their province. The law has constituted them the proper tribunal for the determination of such questions. To take from them this right is to usurp a power not given. The jury should be left free to act upon questions of fact. When there is a total defect of evidence as to any essential fact, or a spark—a '*scintilla*,' as it is termed—the case should be withdrawn from the consideration of the jury. Where, however, the evidence introduced has a legal tendency to make out a proper case in all its parts, then, although it may, in the opinion of the trial court, or the appellate court, be slight, inconclusive and far from satisfactory, yet it should be submitted to the jury, whose proper province it is to consider and determine its tendency and weight." In the same case we also said: "Another point is made: that, if negligence was the cause of the injury, it was the negligence of the foreman, a fellow-servant of the plaintiff. The foreman had the entire charge and superintendence of the mine under ground. Notice to him was notice to the company. * * * It being the defendant's duty to exercise reasonable diligence in keeping the gangway in a safe condition, it could not absolve itself of that duty by delegating it to others."

As we have suggested, we are of the opinion that the case to which we have referred rules this, and disposes of the questions raised. Counsel for respondent argued with ability that this court has no jurisdiction to review and pass upon the evidence, or the sufficiency thereof, because, under section 1

of article 7 of amendments to the constitution, it can not re-examine any fact tried by a jury. It not being necessary for us in disposing of this case to determine this question, we express no opinion thereon.

Judgment must be affirmed, with costs.

ZANE, C. J., and BOREMAN, J., concur.

1. One who digs sand at a fixed price per load for a furnace company is not a servant for whose negligence the company is liable: *Fink v. Missouri Furnace Company*, 82 Mo. 276; 52 Am. Rep. 376.

2. Where a master employs an inexperienced servant in a dangerous place, he must give him due warning, and is not protected by servant's consent to work: *Jones v. Florence M. Co.*, 28 N. W. 207.

3. A foreman is not a fellow-servant: *Reddon v. U. P. R. R. Co.*, 15 Pac. 262.

brought to the surface and sold by them, or after it had been placed on the railroad cars for shipment to market." The prayer of the bill is that an account be taken of the amount of coal so converted, and for a decree therefor.

The defendant, in his answer, admits that in working the mine the foreman, superintendent and workmen did, "inadvertently and unintentionally" run across the boundary into complainant's land, and remove therefrom a small amount of coal without the consent of complainant or warrant of law, and that the coal was taken and sold by the defendant. He says that the trespass was committed inadvertently, the defendant having frequently and in ample time, directed the foreman not to go upon complainant's land, but to leave a safe margin, which instructions were intended to be complied with, the mistake being occasioned by the unevenness of the surface of the ground, and the nearly level grade of the excavation. As soon as defendant's attention was called to the fact he at once stopped work in that part of the mine, and complainant never had any further cause of complaint. The answer further states that measurements were made and estimates taken by agents of the complainant sent for the purpose, so as to ascertain the amount of coal thus mined, with the result of which defendant was satisfied. From these measurements and estimates, the defendant finds, he says, that the coal thus mined would not exceed 3,248 bushels, which, at a royalty of one cent per bushel, the rate at which complainant was leasing its lands for mining purposes, would be \$32.48. And in order to prevent litigation he made a formal tender of \$90 to the complainant, being about three times the actual sum due "in full satisfaction of the coal mined," which sum he is ready to bring into court if complainant will accept the same. Upon the refusal of complainant to accept the tender, defendant at once offered, if the company preferred a new measurement, to allow them to send any competent person to the mine, and to afford him every facility for making the measurement and ascertaining the quantity of coal taken, and to pay for the amount ascertained at the usual price. Shortly afterward complainant and defendant's partner agreed that an engineer might be sent by complainant to estimate the coal to be paid for at one cent a bushel, but the engineer was never sent. The defend-

ant denies that either he or his partner, with the design of preventing complainant from ascertaining the amount of coal mined, pulled down the pillars, props or supports of the roofs, and says that the falling in of the mine was the usual and necessary effect of time.

The proof shows that defendant commenced working his mine in August, 1880, the foreman being instructed not to cross the boundary line, but to leave a margin. The foreman says he did step the distance on the surface of the earth, intending to follow his instructions, but he was deceived in the direction of the first branch, and the miners themselves began to talk about the mine having crossed the boundary. Under these circumstances, on April 13, 1881, the complainant sent an engineer who did actually measure the surface of the ground, and the first, second and third branches of the mine. As the result of this survey, the field notes of which are appended to his deposition in this cause, he found, and so reported to the defendant, that the first branch was over the line about twenty-seven feet, but that the other branches were not, and he told defendant's foreman how far he might safely go, which the latter marked on the walls of the cuts. Work was at once stopped in branch No. 1, and never resumed. The other branches were continued to be worked within the limits designated by the engineer. In June, 1881, the same engineer returned and measured branches 5, 6 and 7, No. 4 having, it seems, fallen in, and told defendant, who was with him, that none of them were over the line. After the commencement of this litigation, the same engineer makes a new survey of the surface of the ground and finds that he was in error in his first survey by about eleven and one half feet, to that extent increasing the trespass on complainant's land, and the amount of coal mined. And the master has increased the estimate of coal taken, upon the basis of this last survey, to 8,890 bushels. The evidence is clear that neither the defendant nor his foreman intended to, or did actually permit the working of the branches beyond the points designated by the complainant's engineer, and the weight of proof is that the work was not carried any farther. A few of the miners are introduced by the complainant as witnesses, who undertake to guess at the length of the several branches, only one of them having adopted any mode of measurement, and he only as to one branch. The

testimony of these witnesses is corrected by the time books of the defendant showing the actual amounts of coal mined and paid for. The master has considered the testimony, and, properly enough under the circumstances, has given it due weight in favor of the complainant. We concur with the chancellor in thinking that the master's estimate is substantially correct. The proof entirely disproves the charge of the bill that props were intentionally removed to prevent accurate measurements. The roof of the mine seems to have been of a rotten clay, through which water seeped, and fell in, in some instances before the work was completed, and in other cases very soon after the work of mining ceased. But if the complainant had acted upon the defendant's proposition for new measurements about the time of the tender of \$90, which seems to have been within a month or two after the visit of complainant's engineer in June, 1881, there would have been little difficulty in obtaining accurate estimates.

Upon the foregoing facts we may say that it was the duty of the defendant in the first instance to have made the necessary surveys to prevent any encroachment upon the land of the complainant. He was in fault in not so doing, and he was also in fault in not keeping accurate accounts of the coal mined in each of the branches in the vicinity of the boundary line. For these omissions of duty on his part, the master was clearly right in construing the evidence liberally against him. And if there had been the least evidence of bad faith on the part of the defendant, every intendment would be in favor of his adversary. But we think the evidence conclusively demonstrates his good faith. He not only threw no obstacle in the way of the complainant's engineer, but he showed his willingness to abide by his action. Nay, more; after making a liberal tender upon the basis of the measurements of that engineer, conceding for the present that the measure of damages would be the usual royalty for mining, he was willing for a new measurement and promised to settle by it. And there can be no doubt that he would have joined in making new measurements, leaving the question of the measure of damages open. Under these circumstances, the original fault of the defendant may be treated, in view of the assurances of the complainant's engineer and the subsequent conduct of the complainant, with

leniency. The trespass on the complainant's land was clearly not willful and intentional, but inadvertent.

The authorities are hopelessly in conflict as to the proper measure of damages where coal or ore has been mined by one person upon the land of another. Much of this conflict has grown out of the forms of action at common law, and the difficulty of confining the recovery to mere compensation, where the principle upon which the form of action was supposed to rest allowed a larger recovery. The tendency of the recent decisions is to ignore the form of action, and to regulate the recovery by the rule of compensation, looking to the intention of the defendant. The course of English decision is curiously illustrative of the change of judicial opinion. Originally, even in the case of an inadvertent trespass, the plaintiff was held entitled to the value of the coal after it was mined, without any deduction for the cost of severing: *Martin v. Porter*, 5 M. & W. 351; *Morgan v. Powell*, 3 Q. B. 281; *Wild v. Holt*, 9 M. & W. 672. Afterward, the rule was modified so that in a case where the trespass was fully proved, but without fraud, it was held that the defendant was liable only for the value of the coal, deducting the cost of its severance and carrying it to the mouth of the mine: *In re United Merthyr Collieries Co.*, L. R. 15 Eq. 46. Again, even at law in an action of trover, if the jury found that the defendant acted fairly and honestly under a claim of right, they were instructed to give the fair value of the coal, as if the coal field had been purchased from the defendant: *Wood v. Morewood*, 3 Ad. & El. (N. S.) 440. And, finally, in a case in the House of Lords, it was held that where the defendant innocently and ignorantly worked the coal beyond his boundary, the measure of damage was the value of the coal *in situ*, in addition to any surface damage there may be: *Livingstone v. Raeburn's Coal Co.*, 42 L. T. (N. S.) 334. And this rule has been adopted by the court of chancery: *Hilton v. Wood*, L. R. 4 Eq. 432; *Jegon v. Vivian*, L. R. 6 Ch. 760. The tendency of the American decisions is to adopt the same rule, whether the action be trespass, as in *Foote v. Merrill*, 54 N. H. 490, or trover, as in *Forsyth v. Wells*, 41 Pa. St. 291. "Where" says the court in this last case, "there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury

done is the purpose of all remedies; and so long as we bear this in mind we shall have but little difficulty in managing the forms of action so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong he ought not to have been charged with the value of the coal after he had been at the expense of mining it, but only with its value in place, and with such other damage to the land as his mining may have caused. Such would be manifestly the measure in trespass for mesne profits." And so we have held in *Ross v. Scott*, in an opinion delivered with this. And such was the decision of this court in the case of a wrongful trespasser who cut timber on land in *Ensley v. Nashville*, 2 Baxt. 144.

The complainant in his bill says that he elects "to sue for the value of said coal so converted, and not for the wrongful removal thereof." He then argues that his bill is in the nature of an action of trover for the conversion of the coal after it had been mined, and gives him a right to its full value without deduction, or, at any rate, only a deduction for bringing the coal, after it is severed, to the mouth of the mine. And this is the rule of the early cases in England, and of the courts of Maryland and Illinois. But the fact that any deduction is allowed shows that the action of trover does not allow the plaintiff to recover the full value of the property converted. And the learned counsel of the complainant in this case admits that, according to the authorities, the recovery is increased or diminished by the greater or less wrongful intent in the conduct of the defendant. If, he says, the coal was taken under an honest but mistaken belief of ownership, the measure of damages is the value of the coal at the mouth of the mine, deducting the expense of digging and transporting it to the mouth of the mine. But if the action is thus flexible, it may well be made still more so in order to secure the end of all action, just compensation. "It is quite apparent, therefore," says the Supreme Court of Pennsylvania, in *Forsyth v. Wells*, *ut supra*, "that this form of action is not so uniform and rigid in its administration as to force upon us any given or arbitrary measure of compensation. It is simply a form of reaching a just compensation, according to circumstances, for goods wrongfully appropriated. Where there is no fraud or violence or malice, the just value of the property is enough."

And this is the result of the late English decisions in the action of trover. The action is, therefore, what our statute provides that all actions for wrongs to property shall be, in which money only is demanded as damages, and that is an action on the facts of the case: New Code, Sec. 3441. And by waiving the tort and coming into equity, the complainant has certainly not rendered his action less flexible. The facts of this case do not show any special ground for damages to the complainant's land, and all that he can reasonably ask is just compensation, which would be the value of the coal taken *in situ*, or the usual royalty for mining—one cent per bushel.

The tender made by the defendant to the complainant was not technically valid because it was accompanied with the demand of a receipt in full, and because not brought into court. But we think it is sufficient, in connection with the other circumstances of the case, to require us to exercise the discretion of the chancery court in the matter of costs, and to charge the complainant with the costs of the court below. The defendant, having prosecuted his appeal with effect, is, of course, entitled to the costs of this court as against the complainant.

FOSTER ET AL. V. WEAVER.

(118 Pennsylvania State, 42. Supreme Court, 1888.)

¹No deduction for expenses in favor of the fraud of co-tenant. Co-lessees with plaintiff, an absent owner in the lease, struck oil, shut down the well and advertised it a failure. They then, through a stranger, secretly purchased plaintiff's interest for less than he had paid for it, whereupon they resumed work and pumped largely: *Held*, That the fraud being proved, plaintiff was entitled to his share of the gross receipts for oil without any allowance for expenses.

Error to the Court of Common Pleas of Forest County.

The cause below was in trespass by Josiah Weaver against Jacob Foster and L. Simon, instituted on August 10, 1887, and on August 16, 1887, by agreement of parties referred to Mr. L. W. Wilcox, as referee under the Act of May 14, 1874,

¹ *Peckham Iron Co. v. Harper*, 41 Oh. St. 100; *Little Pittsburg Co. v. Little Chief Co.*, 15 M. R. 652.

P. L. 166. The findings of fact reported by the referee were as follows:

The plaintiff and defendants became tenants in common in an oil lease for fifty acres of land in Harmony township, dated November 1, 1884, at one eighth royalty for a term of twenty years, each owning a one third interest.

By the lease, a well was to be completed within six months and a second well commenced within six months from completion of the first, if productive, and operations to be carried on diligently and to the best interests of both parties to the lease.

In 1885 the lessees began operating for oil under this lease. The plaintiff lived in New York and the defendants were oil operators and had charge of the drilling. About the middle of March, 1885, an oil bearing sand rock was found and oil in paying quantities, and the prospects were favorable for a good well. The defendants ordered the well shut down and drilling stopped, and the well was reported to those inquiring to be a failure. About six weeks after this, one of the drillers named Nolan, at the suggestion of the defendants, went to New York to purchase plaintiff's one third interest, and reported to him that the well was a failure and the prospects for oil were poor. Nolan succeeded in getting the plaintiff's interest for \$500, which was less than the plaintiff had paid out, and a conveyance was made to him dated May 11, 1885. In a few days Nolan conveyed the same interest to the defendants for \$600. The purchase by Nolan was, in reality, for defendants, who obtained other lands and leases adjoining by purchase and by lease, and in the early part of June began pumping oil from the well already drilled, which proved to be a good well. During this year and after they had acquired plaintiff's interest, the defendants drilled another well on this lease which also proved to be a good well.

Early in 1886 the plaintiff, hearing of the oil developments and learning that defendants were the owners of his interest, went to them and tendering the \$500 paid him by Nolan, demanded a reconveyance of his third interest and his share of all the oil produced, which was refused. During the year following the defendants drilled other wells which proved even more productive. Some efforts were made by the plaintiff.

iff and defendants to come to some agreement. The defendants offered to reconvey to plaintiff and pay his share of oil, if he would pay his share of all the expenses of operating, and also one third of the balance due on a leasehold mortgage they had given on this and other leases of defendants, the plaintiff's share of which would amount to about \$200. This the plaintiff refused to do and in April, 1887, he had the defendants and Nolan arrested for conspiracy, and was about to bring an action of ejectment or suit in equity, when it was finally agreed that the plaintiff should pay defendants what they had paid Nolan, and they should reconvey to him his one third interest; and the right of defendants to deduct one third of the expenses and costs of production from the proceeds of plaintiff's one third of the oil already produced was left unsettled and to be determined according to the rights and equities of the parties in some form of action, the same as if the plaintiff had recovered possession by adversary proceedings.

This arrangement and the reconveyance to plaintiff of his interest was made on the fourth day of June, 1887, and for his share of the oil up to that date this suit was brought. The sales made by defendants to the pipe line company were taken as giving the correct price of the oil. The proceeds of the one third of the oil up to June 4, 1887, was \$4,596.41, and the one third of the costs and expenses of operating, including carpenters, rigs, boilers, engines, casing, tubing, tanks, torpedoes, expenses pumping, superintending, etc., amounted to \$4,874.92; the expenses exceeding the receipts from oil.

The referee found upon the foregoing facts the points of law in favor of the plaintiff, to wit: That plaintiff could not be made the defendants' debtor for expenses incurred under an adversary holding without his consent, and that the lease expenses could not be recouped for the value of the oil removed from the land during such adversary holding.

Judgment was entered upon his report in accordance with the stipulation, for \$4,644.39, to wit: The sum of \$4,596.41, aforesaid, with interest from June 4th to date of judgment; whereupon the defendants took their writ of error.

T. F. RITCHEY, for the plaintiffs in error.

S. D. IRWIN, W. M. DAME and W. K. JENNINGS, for defendant in error.

Opinion by Mr. Justice STERRETT.

There is no question as to the correctness of the learned referee's findings of fact. The sole contention is as to the law applicable to the undisputed facts clearly and concisely stated in his report. The most important of these is, that defendants below, being tenants in common with plaintiff of an oil lease, conspired with one of their employes to obtain his interest in the lease at an undervalue, and by gross deception and fraud accomplished their object. As soon as he discovered the fraud that had been practiced upon him by his co-tenants, he tendered them the consideration he had received and demanded a reconveyance of his interest. Efforts to compromise resulted in an agreement that they would reconvey the same and reinstate him in possession upon his paying the amount they had expended in fraudulently procuring his interest in the lease. The right of defendants below "to deduct one third of the expenses and costs of production from the proceeds of plaintiff's one third of the oil already produced was left unsettled and to be determined according to the rights and equities of the parties in some form of action, the same as if plaintiff below had recovered possession by adversary proceedings."

This action of trespass was brought to determine the disputed matter thus excepted and reserved for future determination. The real question, therefore, before the referee, was whether defendants below were entitled to deduct from the proceeds of plaintiff's share of the oil produced, while he was fraudulently dispossessed, a proportionate part of the expenses incurred by them in producing the oil during that period. According to their agreement, as found by the referee, that question is to be determined "as if plaintiff below had recovered possession by adversary proceedings." As to the measure of damages, therefore, the compromise under which the reconveyance of his interest in the lease was made can not operate as a condonation of the fraud, because the effect of that fraud on the question of damages is expressly excepted by the terms of the agreement.

As well stated by the referee the question is this: "When the owner of land has been deprived of the same tortiously or by fraud, and after recovery brings suit for mineral taken from the land by the trespasser, while in wrongful possession and converted to his own use, is the plaintiff entitled as damages to the value of the mineral so taken, in place, or the value in its changed and improved condition as a chattel?" In other words, is the wrongdoer entitled in such suit to recoup from the value of the mineral, as a chattel, the expense of mining or producing it? The mere statement of the proposition in this form suggests the only answer that can be given unless it is the policy of the law to make the way of the transgressor easy and secure.

The relation of the parties to each other, as co-tenants of the lease, and the fact that two of them, after fraudulently dispossessing the other, may have continued to use the property as it probably would have been used if they had all remained in possession, does not mitigate the tort, nor qualify the ordinary rule of damages. Co-tenants are bound to respect the rights of each other quite as much as if they were strangers in title.

We find no error in the conclusions of the learned referee.

Judgment affirmed.

1. Off-sets for expenses can not reduce the damages below a nominal sum: *Empire Co. v. Bonanza Co.*, 67 Cal. 406.

2. The measure of damages for refusal of vendee to accept deed tendered is the contract price with interest from date of tender: *Gilpin M. Co. v. Drake*, 8 Colo. 586.

3. Measure of damages to evicted lessee: *Hoosac M. Co. v. Donat*, 10 Colo. 529.

4. Damages between time of action brought and date of trial not allowed: *Patchen v. Keeley*, 19 Nev. 404.

5. Measure of damage for breach of contract to lease coal lands is the value of the privilege to be determined in view of the quantity of coal, etc., amount of royalty and all other circumstances: *Chambers v. Brown*, 28 N. W. 561.

JOHNSTON'S APPEAL.

(7 Atlantic Rep. 167. Supreme Court of Pennsylvania, 1886.)

The transportation of natural gas for public consumption is a public use, and a corporation engaged in its supply is vested with the right of eminent domain. An injunction against laying its pipes, after compensation tendered, was, therefore, properly denied.

Appeal of Henry M. Johnston from decree of Common Pleas No. 2, Allegheny County, dismissing his bill in equity filed against The People's Natural Gas Company and others.

The bill alleged that complainant is the owner of a farm of eighty-five acres, in Penn township, Allegheny county, and that defendant is a natural gas company, incorporated under the act of May 29, 1885; that by the terms of its charter the company is formed for the purpose of producing, dealing in, transporting, storing and supplying natural gas; that the places where natural gas is to be mined are in said county and Westmoreland county; that the places where it is to be supplied to consumers are in the cities of Allegheny and Pittsburgh; and that the route of the line is from Franklin township, in Westmoreland county, through Penn township into the city of Pittsburgh, and thence across the Allegheny river into the city of Allegheny; that the said company entered upon complainant's farm, against his will and without his consent, and began to dig a ditch thereon, and threaten to take and occupy a strip of ground, and are proceeding to dig ditches along said strip, and lay pipes for the transportation of natural gas; that said company claims to have the right of eminent domain, and has filed a bond in court to secure complainant against damages; that said act is unconstitutional and void, in that it authorizes the taking of private property for a private use; that defendant is not a corporation for the transportation and supply of natural gas for public consumption, but is a mere private corporation for the marketing of its own commodities to and with a limited portion of the public. The bill, therefore, prayed for an injunction to restrain defendants

from digging trenches and laying pipes on any part of complainant's farm.

The defendant's answer averred that the uses described in the act of Assembly constitute public uses and not private uses, and denied the unconstitutionality of said act. The cause having been set down for argument on bill and answer, the court, in an opinion by EWING, P. J., dismissed the bill, whereupon complainant took this appeal.

HUGHEY & BENNETT and JOHN S. FERGUSON, for appellant.

The right to enter on streets does not give the right as against the land owner: *Sterling's Appeal*, 111 Pa. St. 35; *Penn Fuel Co. v. Com.*, 15 W'kly Notes Cas. 425; *Donnelly's App.*, 72 Pa. St. 192; *Union Passenger Ry. Co.'s App.*, 81½ Pa. St. 91. The courts may prevent the taking of private property for private use, even though the legislature has declared such use to be public: *Talbot v. Hudson*, 16 Gray, 417; *Speer v. Blairsville*, 50 Pa. St. 150; *Trombley v. Humphrey*, 23 Mich. 471; *Darlington v. U. S.* 82 Pa. St. 382. This is not a public use: *Finney v. Somerville*, 80 Pa. St. 59; *Van Horn v. Dorrence*, 2 Dall. 304; *Edgewood Co.'s App.*, 79 Pa. St. 257; *Waddell's App.*, 84 Pa. St. 90; *Lowell v. Boston*, 111 Mass. 454; *Jordan v. Woodinard*, 40 Me. 317; *Bloomfield Gas Co. v. Richardson*, 63 Barb. 437.

GEO. SHIRAS, JR., and S. SCHUYER, JR., for appellees.

When the legislature has declared a public use this will be conclusive, unless the contrary clearly appears: *Cooley Const. Lim.* 657; *Olmstead v. Camp*, 33 Conn. 532; *Reddall v. Bryan*, 14 Md. 444; *Kane v. Baltimore*, 15 Md. 240; *Norwich Gas Co. v. City Gas Co.* 25 Conn. 39; *Harding v. Goodlett*, 3 Yerg. 41.

PER CURIAM.

It is a curious objection to set up against the act of May 29, 1885, in view of the present consumption of natural gas, that its use is not a public one, and that therefore those

corporations which are engaged in its transportation may not be vested with the right of eminent domain. As well might this objection be urged against the vesting of this power in those companies which have been incorporated for the purpose of supplying our towns and villages with water, in which the public interest is found, not in the transportation, but in the use of that fluid after it has, by these agencies, been transported. Nor would it seem to us as of the slightest materiality that the water thus produced had been drawn from a single spring, well or basin. Just so with natural gas. It has become a public necessity; but as it can not be used except it be piped to the manufactories and residences of the people, it follows that, as the piping of it is necessary to its use, the means so used for its transportation must be of prime importance to the public and directly affect its welfare.

The decree of the court below is affirmed, and the appeal dismissed, at the costs of the appellant.

1. A corporation organized on what the court styles an "omnibus charter" may operate as a natural gas company: *Carother's App.*, 118 Pa. St. 489.
2. An employe injured by explosion of natural gas from a main, must prove a negligent escape chargeable to the company before he can recover: *Allegheny Heating Co. v. Rohan*, 118 Pa. St. 223.
3. The corporation act providing for gas manufacturing companies can not be extended to a company intending only to distribute a natural product: *Emerson v. Com.*, 108 Pa. St. 111.

**¹PETER CANTER V. THE COLORADO UNITED MINING
COMPANY, LIMITED.**

(35 Federal R. 41. U. S. Circuit Court, District of Colorado, 1888.)

²Defective ladder—Employer not an insurer of safety, but bound to diligence. A complaint for damages arising out of an accident caused by the breaking of a ladder averred an absolute duty in defendant to keep the ladder safe and secure: *Held*, that the duty was stated too broadly and they were bound only to reasonable care and diligence to produce such condition.

At Law.

Action by employe for damages for personal injuries. Plaintiff fell down the main working shaft of the Terrible mine from the 12th to the 13th level, by reason of the breaking of one of the rungs of the ladder.

On demurrer to complaint.

THOS. M. PATTERSON and C. S. THOMAS, for plaintiff.

R. S. MORRISON, JACOB FILLIUS and GEO. H. KOHN for defendant.

BREWER, J.

In this case there is a demurrer to the complaint. The cause of action is one for personal injuries. There is really no difference between counsel on both sides and the court as to the rule of law applicable to cases of this kind. The complaint charges a breach of duty on the part of the defendant in failing to keep a ladder in good condition, one

¹ The case was afterward settled without trial.

² *Williams v. Clough*, 3 H. & N. 258; *Holmes v. Clark*, 2 Thomp. Neg. 968; *Atchison R. R. v. Wagner*, 7 Pac. 204; *Cahill v. Hilton*, 13 N. E. 341. The operator undertakes to lower and hoist the miner—his duty in the premises stated: *Moran v. Harris*, 63 Iowa, 394.

of the rounds of which broke and dropped the plaintiff, causing the accident. It is not the absolute duty of an employer to see that the instruments and machinery he provides are safe. The limit of his duty is reasonable care and precaution in that respect. I think that, taking the complaint as a whole, it may be an open question whether any more than a breach of such duty is charged, and yet, in the clause stating the duty separately, it is stated broader than the law imposes. The particular clause reads thus:

"That it was the duty of said defendant company to keep the said ladder in good, safe and secure condition, so that those in its employment might ascend and descend the shaft upon the same, secure from harm by reason of the breaking of or injury to the same."

That, construed strictly, is an affirmation that it was an absolute duty, and a breach of that duty necessarily would cause liability, and in cases of this kind, where the form of the complaint is challenged in the first instance—cases in which we all know that the sympathies of the jury naturally go out to the injured person—I do not know but what it is fair and right that the language of the complaint should be made technically accurate in describing the duty resting upon the defendant. So, although there is general language in the subsequent part of the complaint that the defendant negligently and carelessly did so and so, I think, as this is challenged in the first instance, it would be no more than fair to sustain the demurrer, and at the same time permit an amendment by interlineation in this clause, so that it shall read that it was the duty of said company to use reasonable care and diligence to keep the said ladder, etc., or putting at the close of the sentence, "so far as the same could be accomplished by the exercise of reasonable care and diligence," so that when the complaint is read to the jury, and commented on, it may appear that the limit of its duty is the exercise of reasonable care and prudence.

Demurrer sustained.

1. There is no duty imposed on a coal mine to ward or ware against sunken dump fires: *McDonald v. Union Pac. Ry. Co.*, 35 Fed. 38.

2. A party can not escape damages for negligently allowing water to

escape, on the ground that plaintiff might have avoided loss by digging a slight cut on his own land: *McCarty v. Boise City Co.*, 10 Pac. 623.

3. The employer is not bound to furnish the safest machinery: *Burke v. Witherbee*, 98 N. Y. 562; *Payne v. Reese*, 100 Pa. St. 301.

4. Extreme holding as to contributory negligence—the court assuming absolute knowledge of danger from the mere presence of steam in a gangway: *Payne v. Reese*, 100 Pa. St. 301.

5. Employe can not recover when he knew of the defect or should have reasonably foreseen the accident: *Heath v. Whitebreast Co.*, 23 N. W. 148. Nor where the danger was as well known to himself as to his employer: *Olson v. McMullen*, 24 Id. 318. Or where the neglect of a co-employe caused the injury: *Kevern v. Providence M. Co.*, 70 Cal. 391.

6. But where it was the duty of a foreman to see that a miss-shot was removed, the defendant was held: *Kelley v. Cable M. Co.*, 14 Pac. 633. And the same where the foreman negligently put off the timbering: *Reddon v. Union Pac. Ry.*, 14 Pac. 262; *Trihay v. Brooklyn Co.*, 15 M. R. 535.

7. Owner held liable to miner employed by contractor: *Kelly v. Howell*, 41 Oh. St. 433.

SNYDER, Respondent, v. BURNHAM ET AL., Appellants.

(77 Missouri, 52. Supreme Court, 1882.)

¹**The relation implied.** Persons jointly conducting a mining venture are partners, though there is no agreement for a partnership.

No review of facts. This court will not review the action of the trial court sitting as a trier of fact in a law case.

New trial—Cumulative testimony. A motion for a new trial on the ground of newly discovered evidence is properly overruled when the affidavit in support of the motion fails to disclose legal diligence to discover the evidence before trial, or when the evidence is merely cumulative.

Appeal from Dade Circuit Court.

E. J. SMITH, L. W. SHAFER and D. P. STRATTON, for appellant Stevenson.

D. A. DEARMOND and B. G. THURMAN, for respondent.

NORTON, J.

This suit was commenced upon an account, in the Dade County Circuit Court, to recover from defendants the sum of \$209.25, and interest, for goods sold and delivered and money paid to defendants and persons in their employ while said defendants, as alleged, were engaged as partners in the mining business. Defendant Burnham made default and Stevenson answered, denying every material allegation of the petition and each and every item of the account. The cause was tried by the court without the intervention of a jury, and judgment rendered for plaintiffs for the sum of \$212.40, from which defendant Stevenson has appealed to this court, and assigns as the chief grounds of error the action of the court in giving and refusing instructions, and also that there was no evidence that defendants were partners.

The evidence tended to show that prior to September 25, 1876, defendant Burnham and one Van Dreaser had an inter-

¹ *Nisbet v. Nash*, 11 M. R. 531.

est in a pump shaft on the land of the Dade County Mining and Smelting Company which was being sunk for lead ore; that about the date above mentioned, defendant Stevenson bought the interest of said Van Dreaser in said shaft. Defendant Burnham testified that from the 25th day of September, 1876, to February 27, 1879, he and Stevenson were partners in running said pump shaft; that he had no talk with Stevenson about his coming into the shaft, and no arrangement was made between them except he said "he had bought out Van Dreaser and would help bear expenses;" and that they were unable to prosecute the work without aid, and that the mining was carried on under the name of Burnham & Co.; that he arranged with plaintiffs to pay the hands in their employ in working said shaft out of the store upon his, Burnham's, orders, and that he was to give plaintiffs warrants issued by the Dade County Mining and Smelting Company as advances on mineral, as so much cash for goods furnished as aforesaid; that the account sued on was for goods so furnished and cash in excess of said warrants, and was correct. Stevenson, in his evidence, admits the purchase on the 28th day of September, of Van Dreaser's interest in said pump shaft; but says that he and Burnham did not begin work on the pump shaft till the 2d day of October, 1876; while he worked on the Burnett lot Burnham worked on the pump shaft. He further stated that they were to furnish two hands on the pump shaft, and the Mining and Smelting Company were to allow them \$9 per week for running the engine. The Mining and Smelting Company were to pay the expenses of running the shaft. Burnham told witness, from time to time, that he was keeping the time of the hands and getting warrants and settling with them. Some of the men complained to witness that they had to go to plaintiffs for pay. Witness told them they could get their pay at the office. Witness further testified: "We were mining for lead under the Mining and Smelting Company. The pump shaft was regarded as a test and the company were anxious to have it pushed. We were not able to bear the entire expense, and the company made these advances to aid us; they were to be repaid by us out of the mineral if we should get any out of the shaft, all except for the services of the engineer." Mr. Taggart, president of the smelting company, tes-

tified that he drew up the contract between Stevenson and Van Dreaser, on the 28th day of September, 1876; that the mining company furnished the money to sink the shaft; Burnham kept the books, had the management of the business of the pump shaft, gave the time of the men every Saturday and received the warrants to pay them, which were generally issued in gross. The evidence tended further to show that Stevenson, when notified by plaintiffs of the account and that he would be looked to for payment, requested it to be made out, and when Snyder, the collector for plaintiffs, told him they wanted it paid, giving him the amount of it, he said he knew there was an account, but did not think it was so large.

In the light of this evidence we are enabled to see that defendants were engaged in the enterprise of sinking a shaft for the purpose of obtaining lead ore, that it could not be carried on without laborers, that these laborers were employed, that being unable to meet the expenses thus incurred in the prosecution of the business it was arranged by Burnham with plaintiffs that they should pay the hands employed out of their store on his orders and that Burnham was to turn over to them the warrants or checks issued by the Mining and Smelting Company, as an advance on mineral prospectively to be raised out of said shaft, as so much cash in payment of the amount so furnished the hands, and that the Mining and Smelting Company were to be repaid or reimbursed for such advancements out of the mineral which might be taken out of said shaft by Burnham & Stevenson. In view of this evidence we are of the opinion that the objection made that there is no evidence of partnership is not well taken.

In the case of *Duryea v. Burt*, 28 Cal. 569, it was held that if two or more persons acquire a mining claim for the purpose of working the same and extracting the mineral therefrom and actually engage in working the same, and share, according to the interest of each, the profit and loss, the partnership relation subsists between them, although there is no express agreement to become partners, or to share in the profits and losses. So, in *Rockwell on Mines*, page 578, it is said: "It may be concluded that when persons acquire interest in lands apparently for the sole purpose of working the mines in them, they must be considered as entering into a commercial part-

nership." 3 Kent, 42. It follows, from the above, when applied to the facts of this case, that the partnership relation existed between defendants in mining in said pump shaft. The court gave instructions for plaintiffs, embracing this theory of the case, and refused counter-instructions offered by defendants, and in so doing did not err.

It is not necessary to discuss the question raised in the brief of counsel as to whether one partner in a mining partnership can bind his copartner by issuing bills of exchange or negotiable notes in the name of the firm, inasmuch as no such question is presented in the facts in this record.

One item of the account sued on is for \$60 cash, and it appears from the evidence of Burnham that this money was expended in the purchase of a note for lumber, the balance on which amounted to \$70, and that the note was purchased with the consent of Stevenson, and the lumber used in the shaft. Stevenson contradicted Burnham in this respect, and we will not undertake to decide between them, that being the province of the trial court sitting in this case as a jury.

It was also alleged in the motion for new trial, sustained by affidavit, that since the trial defendants had discovered material evidence. The court did not err in overruling the motion on this ground, as the affidavit did not disclose legal diligence on defendants' part to discover the evidence before trial, and as the evidence was merely cumulative: *State v. Ray*, 53 Mo. 345.

Judgment affirmed, in which all concur.

MANVILLE V. PARKS ET AL.

(7 Colorado, 128. Supreme Court, 1883.)

Adventurers testing a prospect under an option contract, are partners. A mining partnership exists where several parties co-operate to work a mine, and ownership of the mine is not essential to such partnership.
¹ A partnership may be implied from the acts of the parties without express contract.

¹ *Snyder v. Burnham*, 15 M. R. 562.

Mining partners have power to bind each other by dealings on credit for the working of the mine as a power incidental to the relation—not extending to the borrowing of money or the giving of notes.

¹ Partners may by contract limit their powers inter sese, but such limitation does not bind strangers having no notice thereof. And such limitation and notice must be specially pleaded.

² A default at time of final judgment against co-defendants who fail to plead is not ill taken at such time.

Error to County Court of Lake County

The facts are stated in the opinion.

LOUIS BRANSON, for plaintiff in error.

R. D. THOMPSON, T. A. DICKSON and W. H. NASH, for defendants in error.

STONE, J.

The plaintiff, Manville, sued the defendants to recover the price of certain goods sold and delivered, for which the complaint alleged a joint and several promise to pay on the part of defendants. Two of the defendants, Parks and Yates, answered on their own behalf, denying the sale and delivery to them, and denying any promise to pay by them, or either of them. The defendant Smith filed a separate answer, denying the sale and delivery, and denying a promise to pay by all or any of the defendants of the sum alleged to be due. The other two defendants, Bush and Henderson, filed no answer. The testimony brought up by the record discloses the following facts: Bush proposed to Parks and Yates that they go into a mining operation together to make some money. Parks and Yates knew that one Brandon had a mine, one half interest in which could be secured to develop and purchase, whereby money could be made if it turned out well, and it was proposed that Parks and Yates make the necessary arrangement with Brandon for this purpose. Accordingly Parks and Yates made a preliminary arrangement with Bran-

¹ *Nolan v. Lovelock*, 9 M. R. 360.

² *Pardee v. Murray*, 15 M. R. 515.

don, and afterward a meeting was had at the office of Parks and Yates, in Leadville, where were present Brandon, Parks, Yates, Bush, Smith and Henderson, at which meeting an agreement was made, and a bond for a deed of a one half interest in the mine in question—called the Tip Top mine—was executed, giving the defendants the privilege of working the mine for ninety days, with the option of purchase within that time. The several interests which the parties were to have in the mine were agreed upon, and mentioned in the bond. A day or two afterward this bond was taken up, by agreement of the parties, and a deed in lieu thereof was executed by Brandon, which was deposited in escrow, conditioned, like the bond, for payment of the agreed price of the half interest in the mine within ninety days, during which time the grantees were to have possession for the purpose of working and development for taking out ore which should be found therein.

The grantees named in the deed were Bush, Smith, Henderson, and Parks and Yates, and the interest of each, respectively, was expressed as in the bond previously. This matter being arranged, it was proposed by Bush that Henderson take charge of the mine as manager or foreman and prosecute work thereon, and, no one objecting to such proposition, it was assented to, and accordingly Henderson immediately employed men, purchased the necessary supplies of tools, etc., and prosecuted work on the mine for two or three months. Parks and Yates both testified that by an understanding between them and Bush they were to pay no money for their interest in the mine nor for working the same, but that such interest was paid for by their legal services in procuring the contract with Brandon, drawing up the papers, etc., and that they had not paid nor been called on to pay a dollar in money for such interest, or for working the mine. Henderson testified that he was to be allowed five dollars per day for his services in superintending the work, and that these wages were to apply in payment of his share in the mine. He also testified that Smith furnished \$120 toward the expenses of the work, and that Bush furnished all the rest of the money that was paid on account of such expenses.

In pursuance of his authority as manager or foreman of the

working of the mine, Henderson purchased of the plaintiff certain supplies, consisting of tools, powder and fuse for blasting, etc., necessary for working the mine, which goods were so purchased by Henderson on behalf of the parties interested, and were sold by the plaintiff, as testified to by him, on the credit of said parties; Henderson informing him, at the time of the purchase, who the parties in interest were, and naming each of the defendants as partners in the enterprise. Plaintiff knew the defendants personally, and Bush was present with Henderson when some of the purchases were made in the store of plaintiff. Henderson testified that he knew nothing of any understanding that Parks and Yates were to pay no part of the expenses, as testified to by them, and the plaintiff had no knowledge or notice of such fact or condition until after the controversy arose respecting payment for the goods purchased from him by Henderson on behalf of all the defendants.

The county court, which tried the case without the intervention of a jury, found as follows: *First*, that from the evidence it is not shown that the said defendants ever entered into a mining copartnership for the purpose of working, carrying on, or developing the said Tip Top mine; *second*: that the defendants never gave the said Henderson any authority to purchase the said goods from the plaintiff in their names and that, in fact, said Henderson never had any authority, in law or fact, to purchase said goods, or any part of the same, or to bind them in any way or manner for the price and value of said goods, or any part of the same, and, *third*: that the said defendants are entitled, under the facts proven and the law, to a judgment against the plaintiff for their costs in this action, by them paid, laid out and expended, and that the plaintiff take nothing by this action.

Judgment was rendered in accordance with these findings, and the principal question to be determined upon the errors assigned is a mixed question of law and fact. Were the findings and judgment in accordance with law, under the state of facts disclosed by the evidence?

The case was tried below, and is argued here upon the theory that the liability of the defendants depends upon whether the relation existing between them in respect to the mine and

its working constituted a partnership. In *Charles v. Eshleman*, 5 Colo. 107, it is said that a "mining partnership is held to exist where the several owners of a mine co-operate in the working of the mine," and the court then proceeds to point out some of the differences between a mining partnership and an ordinary trading partnership; but we apprehend that this language of the court, while applicable to the case before it, was not intended to restrict the definition of such partnership solely to cases where a mine is owned by the parties working it, for it is evident that a mining partnership may exist as well where the parties have an interest merely in the working of a mine, or in carrying on mining operations, as where they own the mine itself. Indeed, in the cases where the question of mining partnership first arose in the English courts, it was doubted whether the joint, or joint and several, owners of mines, who combined to realize and enjoy the profits of the estate under a general system of management, should be considered other than joint tenants, or tenants in common, of the land, not subject to the laws of partnership; while, on the other hand, a combination for the working of mines merely, or as a paramount object, and trading and dealing in the products, would constitute a partnership for such purpose. But these views were subsequently modified, so that for many years both English and American authorities have held that co-tenant owners, as well as lessees or parties having only equitable interests in the property, or holding under license to work or develop, or where the owner furnishes the mine and another the capital and labor, under an agreement to share the profits of the mine jointly, in all such cases there may be a partnership for mining purposes. For a concise review of rules and decisions upon this subject, see Rockwell on Mines, c. V., and the case of *Skillman v. Lachman*, 23 Cal. 198, where, as also in the case of *Charles v. Eshleman*, *supra*, the distinguishing differences between mining and ordinary partnerships are pointed out. Whether a partnership exists is a question of fact; what a partnership is, is a question of law: Pars. Partn. p. 7. We think the facts in this case fairly establish the relation of partnership between the defendants with respect to the mining operations, for the carrying on of which the debt here sued for was contracted. It was one of those min-

ing partnerships, so common in this country, formed for the purpose of carrying on mining operations in a particular adventure, combining some of the incidents of an ordinary partnership, and some of the incidents of a tenancy in common. *Settembre v. Putman*, 30 Cal. 493. To the extent of their interest in the property they were tenants in common, and in the working of the mine they are to be considered as partners: *Dougherty v. Creary*, 30 Cal. 300; *Duryea v. Burt*, 28 Cal. 569; *Skillman v. Lachman*, 23 Cal. 200. Upon the contract with the owner of the mine the defendants had an option of the property in which the respective interests of each were defined and understood, while the working of the mine was for their joint benefit and profit, establishing such a community of interest in the adventure as constitutes a mining partnership: *Pars. Partn.* p. 67; *Duryea v. Burt*, *supra*.

Mr. Parks himself testifies that the bond was to purchase the property, and contained a condition "that Mr. Bush and his party desired to purchase the property, and were purchasing it to *take out* mineral, and it run for sixty or ninety days or more, *for working the property*, and pay money for the mine." Mr. Yates, in his testimony, says: "Mr. Bush inquired of Mr. Brandon about the working of the mine, and Mr. Brandon explained to Bush exactly how the mine ought to be worked; that there ought to be a tunnel run to connect with a certain shaft on the hill; and Bush and Brandon settled the thing finally." Yates further stated, on cross-examination, that "the matter of working the mine was perfectly understood; that Bush and Henderson made the office of Parks and Yates their headquarters; that he (Yates) frequently inquired of Henderson how the mine was getting along; that he made such inquiries on account of his interest in the mine." We think this, and the other testimony in the case upon this point, fully establishes the fact that there was a joint interest and co-operation of all the defendants in the working of the mine, and such interest and co-operation constitute a mining partnership. "A partnership may be implied from the acts of the parties, as well as by express intent and agreement. It is not necessary that the intention of being partners should be expressed in words, for the law supplies the want of these words." *Pars. Partn.* 87. And even though parties may

not intend to become partners, yet, if they enter into such business relations, and carry on such acts as in law constitutes a partnership, they are no less partners than if they had fully intended to become such: *Id.* 86. In seeking to establish a partnership relation, it is a rule of evidence that less strictness of evidence is required where partners are sued than where they themselves sue as such: *Greenl. Ev. Sec. 483*. And while the members of these mining partnerships may not possess implied authority to bind the company or firm by a promissory note, or for money borrowed to carry on the business, yet, as an incident of such partnership, they have authority to bind each other by dealings on credit for the purpose of working the mines, if it appears to be necessary or usual in the management and course of working the mines: *Skillman v. Lachman, supra*.

In this case the articles purchased of the plaintiff were essential to the carrying on of the business, and the accomplishment of the purpose of defendants in working the mine; and the debt being created in the necessary and usual course of the business, and within the scope of the partnership adventure, the individual member who made the purchase had lawful authority to contract the debt and to bind his copartners thereby. The general principle which lies at the foundation of a partner's liability is that every partner has full and absolute authority to bind all the partners, by his acts or contracts in relation to the business of the firm, in the same manner and to the same extent as if he held full powers of attorney from all the members. *Pars. Partn. § 95*. This rule rests upon the doctrine of principal and agent, and, indeed, it may be said that partnerships are but modified forms of the relation of principal and agent. Aside from the differences which exist between a mining partnership and an ordinary commercial partnership, none of which are involved in this case, the principles and rules of law applicable to the latter also govern the former. Hence, the defendant, Henderson, did not require special or express authority from the other partners in order to bind them in the purchase of the goods from the plaintiff. His authority, implied by the law of agency arising out of the partnership relation between the defendants, was ample. True, this authority of each partner to bind the others is an implied

one, and, as between the partners themselves, there may exist, by express agreement, a limitation upon the general implied authority; but third persons, dealing with the firm without notice of such restrictions, are not affected thereby with respect to dealings within the scope of the partnership business: Pars. Part § 95. Hence it is no defense in this case that it was agreed between the partners, if such be the fact, that the defendants, Parks and Yates, were not to be chargeable with the expenses of the business beyond their contribution of legal services as claimed, for, however binding this might operate upon the partners *inter sese*, it could not affect the plaintiff, who dealt with them without any notice of restriction upon the individual liability of particular members: Pars. Partn. §§ 94, 130; *Wood v. Vallette*, 7 Ohio St. 172; *Burgan v. Lyell*, 2 Mich. 102; *Lyell v. Sanbourn*, Id. 109; *Fisher v. Bowles*, 20 Ill. 396; Greenl. Ev. Sec. 481, and cases cited.

As is said in *Winship v. Bank of U. S.*, 5 Pet. 561: "It is usual to buy and sell on credit; and, if this be so, the partner who purchases on credit in the name of the firm must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of copartnership are, perhaps, never published. They are rarely, if ever, seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties as between themselves. The trading world, with whom the company is in perpetual intercourse, can not individually examine these articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct the usual business in the usual way. This power is conferred by entering into the partnership, and is, perhaps, never to be found in the articles. If it is to be restrained, fair dealing requires that the restriction should be made known. These stipulations may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law."

None of the defendants in their answers set up a special partnership, or averred any limitation of liability as partners, and, hence, evidence of any such restriction was inadmissible. To render such evidence admissible, it was essential to plead such limitation, and also aver notice thereof to the plaintiff pre-

vious to the purchase of the goods: Greenl. Ev. § 485; *Lomme v. Kintzing*, 1 Mont. 295. Upon the uncontradicted evidence in the case, both the partnership of all the defendants, and their liability as such to the plaintiff for the amount claimed, were established as conclusions of law, and the plaintiff was entitled to the judgment demanded. Another question presented relates to the subject of default. It is argued by counsel for defendants that no judgment could have been properly rendered against those defendants who failed to answer, for the reason that a default was not first taken against them for failure to answer. We do not regard this as a valid objection. The default could as well be recited and entered at the time of the rendition of final judgment as before. The taking of a default against a defendant upon failure to plead is a privilege of the plaintiff, and if he chooses to waive it previous to trial it is not a matter of which the party in default can complain. The only purpose of a default is to limit the time during which the defendant may file his answer, and that time never extends beyond a trial and judgment: *Drake v. Duvenick*, 45 Cal. 455. There is no difference in principle between a final judgment against a defendant in default for failure to answer, and a judgment against a defendant *nil dicit*; and it has been held that where a final judgment has been rendered against one who was in default, the taking of a default, "if it was essential to the orderly conduct of the proceedings," will be presumed when the contrary does not appear: *Miller v. Miller*, 33 Cal. 353. Under common law practice the summons first issued and the declaration was not filed until the first day of the ensuing term, or, under our former practice, ten days before the term, and on appearance defendant answered only when he was ruled so to do by order of the court. Under the code practice the conditions of the default are prescribed by statute. If the plaintiff fails to take a default before trial this is a favor to defendant of which he can not complain or reap advantage. The validity of a judgment, upon trial had, can not be made to rest upon a withholding by the plaintiff of a favor to defendant, or a waiver of a statutory privilege.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

1. A mining partner objecting to a receiver can not charge for his own services as manager pending litigation: *Pierce v. Pierce*, 15 M. R. 666.
2. The firm is held for fraudulent representations of any member: *Peckham Iron Co. v. Harper*, 41 Ohio St. 100.
3. Liability of partners to laborers working without knowledge of the owners' interests: *Rossini v. Trowbridge*, 17 Pac. 751.
4. A mining partner may not buy out his associate, concealing from him at the time a larger offer pending from an outside party: *Jennings v. Rickard*, 15 M. R. 623.

JEFFORDS V. HINE.

(11 Pacific Reporter, 351. Supreme Court of Arizona, 1886.)

Courts will not review the action of the land department as to the issue of a mining patent, except when fraud has been practiced upon a party or the officers have clearly mistaken the law of the case.

¹The finding of the land department as to a question of fact, or a mixed question of law and facts, on a question properly before it, is conclusive on the courts.

Acts of de facto officer. A person who is acting as a public officer, with the *indicia* of title, is *de facto* such officer, and his official acts are valid, whether he has the legal right to hold the office or not.

Idem. A receiver of the land department, acting also as register, by authority of an order from the land department, is a *de facto* officer, and his official acts are valid, though it be unlawful for him to hold the office.

Appeal from Pima County.

C. C. STEVENS, for appellant, Thomas J. Jeffords.

THOS. MITCHELL, for appellee, Charles T. Hine.

SHIELDS, C. J.

This controversy is as to a right of possession and ownership of a certain mining property in Tombstone mining district, Cochise county. The contention was commenced and continued for years in the land department of the United States, and has finally been transferred to the courts of this Territory. It is not deemed necessary or important to refer with particularity in this case to the history of such controversy so carried on, but simply to state certain well established facts, which will explain our decision, and show upon what ground it rests.

In November, 1875, the plaintiff undertook to locate, and claims to have done so, the mining property in question, giving thereto the name of the "Bronkow Mine." He had the mine surveyed, and in other things claims to have complied with the laws relative to the location of mines. While the

¹*Aurora Hill Co. v. 85 Mining Co.*, 15 M. R. 583; *Craig v. Leitensdorfer*, 123 U. S. 211; *Silver Bow Co. v. Clarke*, 5 Pac. 570.

plaintiff was taking the various steps to procure a patent, and on October 4, 1880, the register of the United States land office at Tucson was suspended by order of the President of the United States. No successor to such register was regularly appointed by the President until May 18, 1881, but in the meantime C. E. Daly, who was at that time receiver of public moneys of the local land office at Tucson, assumed also to act as register of the land office, claiming authority to do so by a communication or order from the land office in Washington. The receiver named continued to act as register, and discharge the duties of said office, from the time of the suspension of the register up to November 16, 1880, when the commissioner of the general land office at Washington informed him that it was not lawful for him to perform the functions and duties of register. When the successor to the suspended register was appointed, plaintiff had his application for a patent, and the proofs accompanying same, submitted to the newly appointed register, who approved the same, and ordered publication to be made, which was done. The plaintiff claims from thenceforward his proceedings were such as to entitle him to a patent.

The rights of the defendant arise as follows: While Daly was acting as register the defendants, acting upon the theory that plaintiffs had abandoned the property in question, filed in the land office at Tucson an application for a patent for the same mining claim in question, but by the name of the "Dean Richmond Claim." Daly, acting as said register, and before the receipt by him of the notification that he had no right to act, ordered the publication of the notice of defendants for a patent to said Dean Richmond claim. To this application the plaintiff filed no adverse claim, presumably acting on the belief that Daly was a mere usurper and without any authority to do anything of the kind as register.

On May 18, 1881, as stated, the successor of the suspended register was appointed, and entered upon his duties, and on that day ordered a publication of the application of the plaintiffs for a patent to the Bronkow mine. August 12, 1881, the defendants filed in the local land office a motion to set aside such action of the register in ordering such publication. This motion was denied by the register, and the defendants ap-

pealed therefrom to the commissioner of the general land office at Washington. On the hearing of this appeal the commissioner reversed the decision of the register of the land office at Tucson, and ordered that the motion of the defendants there made, to set aside the order of the register directing the publication of the plaintiff's notice of application for a patent to the Bronkow mine, be granted. The commissioner seems to have passed fully and squarely upon all questions then in controversy between the parties, holding that the Bronkow application, although first presented, was of no effect *against*, and opposed no bar to, the reception of the application for the Dean Richmond; also that the Bronkow application was subsequent to that of the Dean Richmond; and further decided that C. E. Daly, when he acted as register, was a *de facto* officer, and that the publication ordered by him, while acting as register of the local land office, was a legal publication, and that the rights of the plaintiff were concluded by such publication. The result was that the defendants, the claimants of the Dean Richmond lode, were directed by the commissioner of the land office to complete their entry. From this decision the plaintiff appealed in due time to the secretary of the interior department. The secretary of the interior upon the hearing before him, in all things affirmed the decision of the commissioner of the land office, and ordered that the defendants, as such claimants of the Dean Richmond, should be permitted to complete their entry, and that a patent issue to them for the Dean Richmond claim, which covered the Bronkow location. After such action and decision of the secretary of the interior the complaint in this case was filed in the District Court in and for Pima County.

The complaint in the case asks a rehearing of the whole controversy, upon the ground that the land department of the government erred in its decision, and especially in holding that the application tendered by the defendants was proper, and in allowing them to complete their entry. It is also said to have been error on the part of the land department to hold that Daly was, at the time he took the steps referred to, a *de facto* officer; and also in holding that the Bronkow application was subsequent to that of the Dean Richmond. Other errors are said to have been committed by the land department, but these

are the essential ones, and all that require consideration. The complaint prays that a decree be rendered that the complainant is an equitable owner of the land in controversy, and that the defendants be held to be trustees of the legal title for the benefit of the plaintiffs, and that they be required to deed and convey the premises to the plaintiff. A decree was rendered in the court below dismissing the complaint, and appeal has been taken to this court.

It will be seen at a glance that we are asked to review the action of the land department of the United States, and, indeed, to reverse and set aside the action of such department. It has been so often and repeatedly held that the courts have no right or power to so interfere in cases of this kind, after the action of the land department, that little else need be done in disposing of this case than to refer to the decisions made by the highest judicial tribunal upon the subject. The questions that we are asked now to look into and decide were examined and passed upon by the land department, and, after such examination, it was decided that the patent to the property should issue to the defendants. The power of the land department to make such a decision is not to be doubted. The United States, in thus making a title to the land in question, had a right to determine upon the sufficiency of whatever went to entitle the claimants to the patent actually granted, and the lands named by that conveyance; and, the patent having been granted to the defendants, it can not be said that such patent was issued improperly, unless it can be shown that fraud or imposition was practiced upon the plaintiffs, or upon the land department, or that such officers have clearly mistaken the law applicable to the case.

In *Baldwin v. Stark*, 107 U. S. 463, the law is clearly stated: "It has been so repeatedly decided in this court, in cases of this character, that the land department is a tribunal appointed by Congress to decide questions like this, and, when finally decided by the officers of that department, the decision is conclusive everywhere else, as regards all questions of fact, that it is useless to consider the point further. Where fraud or imposition has been practiced on the party interested, or on the officers of the law, or where these latter have clearly mistaken the law of the case as applicable to the

facts, courts of equity may give relief; but they are not authorized to re-examine into a mere question of fact, dependent on conflicting evidence, and to review the weight which those officers attached to such evidence." Of like import are the decisions of *Johnson v. Towsley*, 13 Wall. 72; *Shepley v. Cowan*, 91 U. S. 330; *Marquez v. Frisbie*, 101 U. S. 473; *Quinby v. Conlan*, 104 U. S. 420; *Lee v. Johnson*, 116 U. S. 48.

The question is very fully discussed in *Quinby v. Conlan*, where it was held that rulings upon matters of fact, or upon mixed questions of law and fact, which were properly cognizable by the land department, and passed upon by it, are put beyond the interference of the courts; and in this regard it is said: "The proofs offered in compliance with the law are to be presented in the first instance to the officers of the district where the land is situated, and from their decision an appeal lies to the commissioner of the general land office, and from him to the secretary of the interior. For mere errors of judgment as to the weight of evidence on these subjects by any of the subordinate officers the only remedy is by appeal to his superior of the department. The courts can not exercise any direct appellate jurisdiction over the decisions of those officers, nor can they reverse or correct them in a collateral proceeding between private parties. * * * It is only when those officers have misconstrued the law applicable to the case as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere, and refuse to give effect to their action. On this subject we have repeatedly, and with emphasis, expressed our opinion, and the matter should be deemed settled."

In *Lee v. Johnson*, 116 U. S. 48, it is said: "The patent having been issued by the officers of the land department, to whose supervision and control are intrusted the various proceedings required for the alienation of the public lands, all reasonable presumptions are indulged in support of their action. It can not be attacked collaterally, but only by a direct proceeding, instituted by the government, or parties acting in its name, and by its authority. If, however, those

officers mistake the law applicable to the facts, or misconstrue the statutes, and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake, and compel the transfer of the legal title to him as the true owner. The court, in such case, merely directs that to be done which those officers would have done if no error of law had been committed. The court does not interfere with the title of a patentee, when the alleged mistake relates to a matter of fact concerning which those officers may have drawn wrong conclusions from the testimony. A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which Congress has devolved exclusively upon the department."

But it is alleged, in avoidance of the law here stated, that there was a mistake of law by the officers of the land department in holding that Daly was an officer *de facto*. This question was fully before the department, and received ample consideration, and, if not purely a question of law or of fact, it was clearly a mixed question of law and fact, which, under the decisions cited, must be regarded as at rest by the decision pronounced. We have no doubt, however, that the decision was right in point of law. It is undisputed that, by virtue of some sort of designation by the land department, Daly undertook to exercise, and did exercise and discharge, the duties and powers of register. He seems to have been an actual incumbent of the office, and his absolute legal right can not be tried in this collateral manner, and between third parties. There was ample proof of user on his part, and that he was acting as register, and apparently, for the time being, in full enjoyment of the office. That was enough to make valid his action in this case. Whatever might be said of the acts of a mere intruder, without any claim or color of title, it is well settled that a person actually obtaining an office, with the legal *indicia* of title, until ousted, so far as his official acts are concerned, they are as valid as if his title were not disputed. The public have an interest in the continuous and unbroken discharge of official duty, and the necessities thereof, and can not wait to try the title of conflicting claimants to an office. For this reason it has come to be held, so often as to be now settled, that the official acts of the incumbent of an office, with

whom alone the public can, under the circumstances, transact business, shall be regarded as legal. The affairs of society could not be carried on in any other way than by treating as valid the official acts of persons *de facto* in office. Upon this point, see the following authorities: *Facey v. Fuller*, 12, Mich. 527; *Keator v. People*, 32 Mich. 484; *In re Corrigan*, 37 Mich. 66; *State v. Williams*, 5 Wis. 308; *Green v. Burke* 23 Wend. 502; *People v. White*, 24 Wend. 529; *Baird v. Bank of Washington*, 11 Serg. & R. 413; *Gurley v. Hawkins*, 2 Clark, 175; *Druse v. Wheeler*, 22 Mich. 439.

The result is that the decrees of the court below will be affirmed.

AURORA HILL CONS. MINING Co. v. 85 MINING Co.
ET AL.

(34 Federal, 515. U. S. Circuit Court, District of Nevada, 1888.)

- ¹Annual labor need not be kept up after entry in land office.
- ²The receiver's receipt, uncanceled, is equivalent to a patent so far as the rights of third parties are concerned.
- A mining location made without prior right of entry upon the ground is void. There can be no valid location made without prior right of entry. Location confers no right of entry where such right did not previously exist.
- ³The decisions of department officers upon questions of law or fact are not subject to collateral attack. Upon questions of fact their decisions are conclusive upon all parties; upon questions of law their decisions can only be reviewed in a proper case made in a direct proceeding for that purpose. Evidence is not admissible, in an action at law, to show error in the decision of an officer of the land department upon any matter submitted to such officer for his decision.
- Ejectment—Title to maintain.** Generally, any person vested with immediate right of possession can maintain ejectment. As against a trespasser, prior possession will support the action. As to mining claims, possessory title is sufficient: Rev. St. § 910.
- Conversion of ore—Measure of damages.** Value at the mine adopted as the proper measure.

¹*Alta M. Co. v. Benson M. Co.*, 16 Pac. 565.

²*Hamilton v. Southern Nevada Co.*, 15 M. R. 815.

³*Jeffords v. Hine*, 15 M. R. 575.

At Law.

R. M. CLARKE, for plaintiff.

A. C. ELLIS, for defendants.

SABIN, D. J.

This is an action of ejectment, brought to recover possession of a certain mining claim, known as the "Prospectus" claim or mine, containing 1,500 feet along the lode or vein, by 200 feet in width, situate in Esmeralda mining district, Esmeralda county, Nevada, together with damages in the sum of \$10,000 for ores alleged to have been removed therefrom, and converted by defendants to their own use. The mining claim is particularly described in the complaint by metes and bounds, according to the United States official survey thereof. The plaintiff is a corporation, organized under the laws of the State of California, and engaged in mining in said Esmeralda mining district. The defendants are citizens and residents of the State of Nevada. The case was tried before the court, a jury having been waived, in writing, by the respective parties. The undisputed facts in the case are simple. On March 12, 1877, Edward T. Greeley duly located the mining grounds in controversy, and entered into possession of the same. Prior to 1880, he conveyed the same to his brother, James L. Greeley, who took possession thereof, and continued to work and develop the mine. In June, 1880, James L. Greeley bonded the mine to H. G. Blasdel, who then took possession thereof, and continued the work thereon. August 19, 1880, Greeley made application in due form at the local land office, in the proper land district, for a patent to the mine. The usual and necessary proceedings were had under this application for patent by Greeley, and on November 20, 1880, he made final proof of entry, and paid the purchase money for the land embraced in the survey of said claim, and received from the officers of said land office the usual certificate of purchase issued in such cases; which entry and certificate are now in full force and effect, uncanceled and unrevoked. No adverse claim or protest was filed in the land office to the issue of a

patent for any part of the claim for which patent was sought. The proceedings in the local land office being regular in all respects, and those officers being satisfied with the proofs submitted, they, on November 20, 1880, forwarded the papers in the case to the commissioner of the general land office, at Washington, for final action. The papers transmitted, as appears from the records of the local land office, were: (1) Application for patent; (2) plat of survey; (3) field notes; (4) proof of posting notice and diagram on claim; (5) certified copy of notice of location; (6) affidavit of citizenship; (7) certified copy of district mining laws; (8) agreement of publisher; (9) register's certificate of posting in office; (10) proof that plat and notice remained on claim during sixty days of publication; (11) clerk's certificate of no suit pending; (12) proof of publication; (13) affidavit of \$500 improvements; (14) statement of fees and charges; (15) register's final certificate of entry; (16) receiver's receipt. From subsequent correspondence it would seem that these papers were duly received at the general land office at Washington. On February 1, 1882, the commissioner of the general land office, by letter of that date, notified the register and receiver of the district land office that he required further proof of the posting of the notice and plat on the claim during the sixty days' period of publication. This proof was not furnished, and in 1885, and again in 1886, the commissioner called upon the register for this additional proof. In response thereto, in January, 1887, H. G. Blasdel submitted his affidavit, as agent for said Greeley, showing the posting of said notice and plat on the claim for the requisite time, which affidavit was duly forwarded to the commissioner. In 1886, and after the commencement of this action, defendants filed in the office of the commissioner a protest against the issue of a patent to Greeley, or his successors in interest, for said claim, alleging that the plat and notice were not posted on said claim for the period by law required. Thereafter the commissioner fixed a day for hearing further proof as to the posting of said plat and notice, before the officers of the local land office, which hearing has not yet been had. After Blasdel's entry upon the claim in June, 1880, he continued work and improvements thereon, and on about October 20, 1880, he paid to Greeley the pur-

chase money for the claim, and received from him a deed of conveyance of the same. As Greeley had made application for patent for the claim, it was understood between him and Blasdel that proceedings thereunder shon'd continue for the benefit of Blasdel or his successors in interest. By mesne conveyances the title to the claim passed to plaintiff in August, 1881, when it took possession thereof, and continued work thereon, expending several hundreds of dollars in developing and improving the mine, and extracting ore therefrom. Plaintiff continued in possession of the mine during the years 1881, 1882 and 1883, working upon and improving the same. Little, if any, work was done on the mine in the year 1884 by plaintiff, and none in the year 1885. During the year 1884, and until the mine was taken possession of by defendants, plaintiff maintained upon the claim its tracks, cars, shops, etc., and the survey posts set by the United States surveyor when surveyed by him for patent. At no time had, or has, it abandoned said claim or mine, or ceased in its efforts to obtain patent therefor. It is not questioned that plaintiff's grantors had expended more than \$500 in work and improvements on the claim prior to application for patent, or that plaintiff, during the years 1881, 1882 and 1883, annually expended upon said claim at least \$100, if not more. It is admitted by plaintiff that he did no work thereon in the year 1884. On the 1st of January, 1885, the grantors of defendants, together with some of the defendants in person, re-located said mine, referring to it by name in their notice of location, and re-named it the "85 Mine." Their notice of re-location of the mine was duly recorded, and under it they entered upon the same, and commenced work thereon. They have retained possession of the same to the present time, and, until the commencement of this action, had annually expended more than \$100 in work upon the mine, and have extracted and removed from it more than 500 tons of ore, of the net value of \$2.50 per ton.

Defendants contend that the mine became and was subject to re-location at the date of their attempted re-location thereof, by reason of the failure of plaintiff to do the annual work thereon required by section 2324, Rev. St. U. S. It is conceded that more than one year had elapsed from the date of the last work done on the mine by plaintiff, in 1883, to the

date of defendants' re-location thereof. It is upon this contention of defendants that the rights of the parties in this action depend. I am not aware that this question of plaintiff's obligation to continue the annual expenditure of \$100 upon the claim pending his application for a patent has ever been judicially decided. If such is the case, I have not found, nor have I been cited to, such decision. It has, however, been ruled upon, and decided adversely to defendants, both by the commissioner of the general land office, and by the secretary of the interior department; and by each of them in a manner so able, strong and just, as to require but little to be further said in support of their conclusions and decisions. Both of these officers hold that after entry and payment of purchase money for the mine, the applicant is not required to expend any further sum of money upon the mine, pending the final decision upon his application, and the issue of patent. I fully concur in the opinions by these officers expressed upon this question, and, without quoting from them *in extenso*, refer to them as the true and correct construction of the law applicable thereto. The commissioner's decision will be found in Sickle's Min. Dec. (1881,) pp. 384-392, rendered Sept. 26, 1878; that of the secretary of the interior, Id. pp. 377-383, rendered March 4, 1879. The same conclusion is intimated by Acting Commissioner Armstrong, at page 373, Id. In the opinion of the secretary above referred to (page 383) he says:

"The true rule of law governing entries of the public land, to which mineral land forms no exception, is that, when the contract of purchase is completed by the payment of the purchase money and the issuance of the patent certificate by the authorized agents of the government, the purchaser at once acquires a vested right in the land, of which he can not be subsequently deprived if he has complied with the requirements of the law prior to entry, and the land thereupon ceases to be a part of the public domain, and is no longer subject to the operation of the laws governing the disposition of the public lands. In such cases there is part performance of a contract of sale, which entitles the purchaser to a specific performance of the whole contract, without further action on his part. When the proofs are made, and the purchase money paid, the equitable title of the purchaser is complete; and the

patent, when issued, is evidence of the regularity of the previous acts, and relates to the date of entry, to the exclusion of all intervening claims. In short, an entry made is in all respects equivalent to a patent issued, in so far as third parties are concerned. In support of these views, I cite the following adjudicated cases: *Carroll v. Safford*, 3 How. 441; *Landes v. Brant*, 10 How. 348; *French v. Spencer*, 21 How. 240; *Witherspoon v. Duncan*, 4 Wall. 218; *Frisbie v. Whitney*, 9 Wall. 187; *Irvine v. Irvine*, Id. 617; *Barney v. Dolph*, 97 U. S. 652; 5 Cruise Dig. 510, 511. As the doctrine is firmly established that, where several concurrent acts are necessary to make a conveyance, the original act shall be preferred, and all subsequent acts shall have relation to it, it is held that an entry made is equivalent to a patent issued, within the meaning and intent of section 2324, Rev. St."

In addition to the above authorities we cite: *Wirth v. Branson*, 98 U. S. 118; *Deffebach v. Hawke*, 115 U. S. 392; *Union M. Co. v. Dungberg*, 2 Saw. 451-455; *Pacific Coast Co. v. Spargo*, 8 Saw. 645; 16 Fed. 318. We need not discuss this proposition further. If any proposition of law can be deemed settled we think this is. The decisions of the commissioner and secretary have stood unchallenged as to their correctness by the courts or legislative action for nearly ten years. They may properly be said to have become rules of property, regulations under and by which property, and the rights thereto, are secured and protected.

The mining interests of the country are of great moment and value. The mode of acquiring title thereto should be by fixed and certain procedure, not subject to capricious change. Sections 2324-2326, Rev. St., were enacted in 1872. They were amended in certain particulars in 1880, and again in 1882. It can hardly be supposed that Congress was not aware of the construction placed upon sections 2324 and 2325 by the department especially charged with their execution; and if such construction had not been agreeable to legislative will and sanction, those sections would have been amended so as to correct, for the future, any erroneous construction thereof theretofore made. We are therefore justified in concluding that this construction has the legislative sanction. Section 2324 provides solely for maintaining a possessory title by the

annual expenditure of work or improvements on the claim. Section 2325 has an entirely different purpose—that of investing title absolute in the applicant for patent. When he has complied with the requirements of this section, made his entry, and obtained his certificate of purchase, his obligations cease, and nothing more by way of consideration is required of him. He may be required to make further proof upon any matter not satisfactorily established, but these things are matters of detail, not of consideration. There is no ambiguity in section 2325, unless we annex to it the conditions prescribed in section 2324 for maintaining an entirely different title, which we have no authority to do. It was suggested, upon the argument of this case, that possibly this court had ruled upon this question in the case of *Bay State M. Co. v. Brown*, 10 Saw. 243, and adversely to the present opinion of the court. We think not. In that case the court said: "A claimant of mining ground, until he has secured patent therefor, must be an actor, and must annually perform the work required thereon; and in establishing his right thereto must show compliance with the law in this respect." This, we think, is wholly correct, and not in conflict with our judgment in this case. This language was used, and is to be understood, as applied to the facts in that case. That was an action brought upon a protest filed to an application for a patent, upon an adverse claim. In that action neither party claimed anything under section 2325, but each sought to establish its and his right to certain mining ground by showing compliance with the provisions of section 2324; and the action was dismissed solely upon the ground that neither party had shown any compliance with the provisions of that section. Neither party had secured a patent or anything equivalent thereto, nor did they claim so to have done. In the case at bar, plaintiff, through its grantors, has surely "secured a patent," or its equivalent, so long as the entry and certificate of purchase are uncanceled.

At the trial of this case, defendants offered evidence to show that the plat and notice were not posted on the claim during the time by law required. This was objected to by plaintiff's counsel as wholly inadmissible. As the case was heard without a jury, the court admitted the evidence, subject to be stricken out, if upon deliberation it should be deemed

inadmissible. The evidence offered on this point was in no wise satisfactory, but it was wholly rejected from consideration. It was in no wise admissible for any purpose in the case, and could not be considered. By law the officers of the land department are charged with the whole business of transferring the government title to public land, and they are exclusively charged with that duty. Within the sphere of their duty their decisions upon questions of fact are conclusive upon all parties. They may, like other officers, err in regard to matters of law, and the correct interpretation thereof. In such cases, upon proper proceedings had for that purpose, their judgments or decisions may be reviewed by the courts, and corrected, if erroneous. This can only be done by a direct proceeding for that purpose, upon proper allegations disclosing the fraud, mistake, or other matter complained of, but in no case can their decisions upon questions of fact submitted to them for decision be collaterally attacked in an action at law. It would be a strange anomaly were it otherwise, and productive of endless confusion in public affairs. If the courts could interfere with the action of the land department in cases before it for decision there would be an end to the orderly conduct of business in that department. And there might be presented the strange spectacle of two tribunals, at the same time, hearing and deciding the same case, arriving at opposite conclusions,—one tribunal, created especially for the purpose, and given jurisdiction and power to hear and decide the case; the other exercising an assumed jurisdiction, with no power or authority to control the action or judgment of the former: *Johnson v. Towsley*, 13 Wall. 72; *Marquez v. Frisbie*, 101 U. S. 473; *Quinby v. Conlan*, 104 U. S. 420; *Steel v. Smelting Co.*, 106 U. S. 447; *Smelting Co. v. Kemp*, 104 U. S. 636; *Baldwin v. Stark*, 107 U. S. 463, 473; *Shepley v. Cowan*, 91 U. S. 330.

It was further urged that this being an action at law, recovery could be had only upon the legal title. This position can not be maintained. Section 910, Rev. St., provides for this class of cases:

“No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damage to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the

United States; but each case shall be adjudged by the law of possession."

As a general rule, any person vested with the right of immediate possession to realty may maintain ejectment. As against a trespasser without color of title, prior possession will support the action. In *Christy v. Scott*, 14 How. 292, the court say:

"But a mere intruder can not enter on a person actually seized, and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser who entered without any title. He may do so by writ of entry, where that remedy is still practiced (*Jackson v. Railroad Corp.*, 1 Cush. 575); or by an ejectment (*Allen v. Rivington*, 2 Saund. 111; *Doe v. Reade*, 8 East, 356; *Doe v. Dyeball*, 1 Moody & M. 346; *Jackson v. Hazen*, 2 Johns. 438; *Whitney v. Wright*, 15 Wend. 171). or he may maintain trespass (*Catteris v. Couper*, 4 Taunt. 548; *Graham v. Peat*, 1 East, 246)."

See, also, *Campbell v. Rankin*, 99 U. S. 261; Sedg. & W. Tr. Title Land, §§ 185, 718 *et seq.* Defendants were trespassers—mere intruders—upon plaintiff's lawful possession when they attempted to re-locate this mine. Having no right to enter upon that possession, they could initiate no right in themselves by their attempted re-location of the mine. The right to locate, or re-locate, a mining claim depends upon the right to enter upon the land where the mine is situated at the time the location is made. Without such right of entry the location is void. Location confers no right of entry unless such right of entry existed at the date of location. *Belk v. Meagher*, 104 U. S. 279. The testimony of the defendants shows that while in the possession of this mine they extracted and removed therefrom 553 tons of ore, which they converted to their own use. The same testimony shows the net value of this ore to have been about \$2.50 per ton in the mine, allowing for extracting and reduction. There is evidence in the case which might bring the measure of damages within the severer rule laid down in *Wooden Ware Co. v. U. S.*, 106

U. S. 432. It is in evidence, undisputed, that plaintiff, by its well-known agent, remonstrated with defendants and denied their right to locate the mine or work upon the same, or remove ore therefrom, and constantly asserted plaintiff's rights. And finally, plaintiff was compelled to bring this action to dispossess defendants. I have, however, adopted the measure above indicated, allowing the defendants the cost of extraction and reduction—*non constat*, however, but that plaintiff could have extracted and reduced this ore at less expense than it was done by defendants.

There must be judgment for plaintiff for possession of the mining ground described in the complaint, together with the sum of \$1,382.50 damages for ores removed and converted, and for costs of this action: and it is so ordered.

1. To invalidate a non-mineral patent, as covering lands containing known mines, there must be an opened pit or at least a known deposit which, under present and immediate conditions, made the land of greater value for the coal than for agricultural purposes: *Colorado C. & I. Co. v. U. S.*, 123 U. S. 308. An outcrop of a coal bed is not sufficient: *Id.*

2. Sufficient proof of existence of quicksilver to cause land to be classed as mineral and to exclude the idea of innocent purchase: *Western Pac. R. R. v. U. S.*, 108 U. S. 510.

3. A lode patent relates back to date of location so as to cut out an intervening town site patent: *Smoke House Lode case*, 12 Pac. 858. See notes, *post* 640.

4. When long delay between discovery and location, the record does not relate back to discovery: *Pelican Co. v. Snodgrass*, 12 Pac. 206.

5. A patent refers by relation to the date of location: *Talbott v. King*, 9 Pac. 434; *Silver Bow Co. v. Clarke*, 5 Id. 570.

6. An agricultural patent granted on worked-out placer claims will not be set aside as issued on mineral lands: *U. S. v. Reed*, 28 Fed. 482.

7. A quit claim deed made after entry conveys the legal title evidenced by the subsequent patent: *Callahan v. Davis*, 2 S. W. Rep. 216; *McClung v. Steen*, 32 Fed. 373.

¹ JOS. REYNOLDS ET AL. V. THE IRON SILVER MINING Co.

(116 U. S. 687. Supreme Court, 1886.)

Patent for placer including specified lode. In procuring a patent for a placer mine claim under § 2333 of the Revised Statutes, where the claimant is also in possession of a lode or vein included within the boundaries of his placer claim, the patent shall cover both, if he makes this known and pays \$5 per acre for twenty-five feet on each side of his vein and \$2.50 per acre for the remainder of his placer claim.

Lodes after-discovered. Where no such vein or lode is known to exist the patent for a placer claim shall carry all such veins or lodes within its boundaries which may be afterward found to exist under its surface.

But where a vein or lode is known to exist under the surface included in such patent, and is not in claimant's possession, and not mentioned in the claim on which the patent issues, the title to such vein or lode remains in the United States, unless previously conveyed to some one else, and does not pass to the patentee, who thereby acquires no interest in such vein or lode.

² **Title to known lodes remains in United States.** The title remaining in the United States in the veins thus known to exist and not claimed or referred to in the patent, the patentee and his grantee have no right to dispossess any one in the peaceable possession of such veins whether the latter have any title or not.

Idem—Plaintiff must prove affirmative title. In such case the rule which applies to actions of ejectment, and to all actions to recover possession of real estate applies, namely, that the plaintiff can only recover on the strength of his own title and not on the weakness of defendant's title.

Error to the Circuit Court of the United States for the District of Colorado.

The facts which make the case are stated in the opinion of the court.

T. M. PATTERSON, C. S. THOMAS, and R. S. MORRISON, for plaintiffs in error.

G. G. SYMES and HUGH BUTLER, for defendant in error.

Mr. JUSTICE MILLER delivered the opinion of the court.

¹ S. C. on second appeal, 124 U. S. 374.

² *Clary v. Hazlett*, 67 Cal. 286; *Sullivan v. Iron Silver Co.*, 109 U. S. 550.

This is a writ of error to the Circuit Court for the District of Colorado, which brings here for review a judgment of that court in an action to recover possession of a part of a vein or lode of mineral deposit.

The plaintiff below, the Iron Silver Mining Company, alleges that it was the owner of 193.43 acres of land, conveyed by the United States by patent to its grantors, and seeks to recover of defendants a part of the land thus patented. It is described in the petition as mining land and a mining claim. The patent under which plaintiff claims, which was introduced in evidence, purports to be for placer mines, and it takes two pages of printed matter to describe the courses, distances, and corners. As the law does not permit any one claim to cover more than twenty acres in locating placer mining claims, it is obvious that under the ruling of this court in *Smelting Co. v. Kemp*, 104 U. S. 636, a number of these claims, amounting at least to ten, have been consolidated into one patent, which was issued to Wells and Moyer, the patentees.

The defendants below asserted a right to the vein or deposit in which they were working under lode claims called the "Crown Point" and "Pinnacle" claims, which were older than that of plaintiff. Defendants also set out another defense in the following language: "That at the time of the survey, entry and patenting of the said Wells and Moyer placer claim, a certain lode, vein or deposit of quartz or other rock in place, carrying carbonates of lead and silver-bearing ore, and of great value, called the 'Pinnacle Lode,' and a certain lode, vein or deposit carrying like minerals of great value, were known and claimed to exist within the boundaries and underneath the surface of said placer claim, survey lot No. 281; and that the fact that such vein or veins were claimed to exist and did exist as aforesaid within said premises was known to the patentees of said claim at all the times hereinbefore mentioned; and that in the application for patent for said placer claim the said vein or veins so known to exist were not included, and were, in the patent issued upon such application, expressly excluded therefrom. And, further, in the said patent it was expressly and in terms reserved that the premises in and by such patent conveyed might, by the proprietor of any such vein or lode of quartz or other rock in place bearing mineral or ore as afore-

said, be entered for the purpose of extracting and removing the ore from such lode, vein or deposit, should the same, or any part thereof, be found to penetrate, intersect, pass through or dip into the premises by such patent granted."

The case was tried by a jury, and a verdict rendered for plaintiff, under a charge from the court which required such a verdict at their hands.

The case here must be decided on the correctness of the action of the court in giving that charge, and in refusing to give instructions asked by defendants.

The full charge of the court, which was duly excepted to, is as follows:

"The evidence tends to prove that the lode in controversy was known to Wells and Moyer, grantees of the United States, at the time they made application for the placer patent under which plaintiff claims title; also that William H. Stevens, one of the grantees of Wells and Moyer, and a grantor of the plaintiff, knew of the existence of the lode at the time application was made by Wells and Moyer for the placer patent, procured such application to be made with a view to acquiring title to himself and his associates to the territory described, and probably with a view and intention to acquire title to the lode now in dispute in this action. Assuming the placer patent to have been obtained with knowledge and intention on the part of the patentees, as stated, the question is whether any right or interest in the lode in controversy was conveyed by the patent. That is a question of some difficulty when presented by or on behalf of one who has shown some right or interest in the lode, or an intention to claim the same according to local law and the acts of Congress. But here the defendants show no right or title in the lode at the place in controversy. They assume the right to follow the lode on its dip without the side line of the Pinnacle location, and under the Wells and Moyer placer location. To that it is essential that they have the top and apex of the lode within their location in the general direction of the location. A small segment of the top and apex of the lode is shown within the Crown Point location, but it extends not with the length of the location, but across it, so as to convert the side lines of the claim into the end lines, and to limit the direction in

which it may be pursued to the space inclosed by those lines. The place in controversy is not within the side lines of either of defendants' locations, nor within the extensions of those lines. No other ground is perceived upon which defendants may assert title or right of possession to the place in controversy, and therefore they are to be regarded as naked intruders, and as to such intruders the plaintiff's placer title may give a right of possession and recovery. The jury is advised to find for plaintiff, with the value of the ore removed from the placer ground by defendants."

This charge was delivered to the jury after a refusal to give any of the following instructions asked by defendants:

"(1) A patent to a placer claim does not pass title to any vein or lode then known or claimed to exist.

"(2) If the Pinnacle and Crown Point lodes, or their vein, upon which it is alleged defendants have followed into the ground of the Wells and Moyer placer, were known at time of issue of Wells and Moyer patent, then the vein was not granted in (or was excepted from) the Wells and Moyer patent, and the plaintiff is not entitled to recover.

"(4) The plaintiff must recover on strength of his own title. If the vein is not conveyed to plaintiffs by the placer patent under which they claim, then it makes no difference whether defendants have any title or not; the plaintiffs can not recover on the weakness of defendants' title.

"(5) If the jury believe from the evidence that the plaintiff's grantors, at the time of the locations and entry of the Wells and Moyer placer claim, knew, or had reason to presume, that underneath it was a deposit or vein of ore carrying precious metals in rock in place, then the same was specially excepted from the grant of their patent, and never was the property of the plaintiff or any of its grantors, having been excluded from the grant of the government. No trespass can be committed thereon as against the plaintiff, and they can not recover, and if the vein upon which the trespass is alleged was the vein so known, then plaintiff can not recover.

"(6) It was not the intention of the Federal government to permit owners of placer mining claims to obtain title to known lodes or veins of mineral ore by embracing the same in applications for patents to such placer claims unless specially designated as lode veins in such applications. The exceptions in a

patent are to be construed most strongly against the patentees, and the exceptions include not only lodes known, but also those claimed to exist within the placer at the date of the patent. If, therefore, you believe from the evidence that the lode deposit within the boundaries of the Wells and Moyer placer claims was known, or upon valid and subsisting grounds was claimed, to exist therein at time of application, entry, or date of patent, then, whether it is the property of the defendants or of the government is immaterial, for in either event there has been no ousting or injury to the plaintiff as to its property, and you should find for the defendants."

The conflict in principle between the instructions asked and refused and those given by the court is marked and easily discerned, and presents the only question in the case. Its primary form is presented by the fourth of the defendants' requests, namely, "that plaintiff must recover on the strength of his own title." This is the fundamental principle on which all actions of ejectment or actions to recover possession of real estate rest. Even where the plaintiff recovers on proof of priority of possession, it is because in the absence of any title in any one else this is evidence of a title in plaintiff. If there is any exception to the rule that in an action to recover possession of land the plaintiff must recover on the strength of his own title, and that the defendant in possession can lawfully say, "Until you show *some* title, you have no right to disturb me,"—it has not been pointed out to us.

The remainder of this fourth prayer was a further statement of the same rule as applied to the case in hand: "If the vein is not conveyed to plaintiff by the placer patent under which they claim, then it makes no difference whether defendants have any title or not; the plaintiff can not recover on the weakness of defendants' title." There is not in the record any pretense or claim of title in plaintiff, except that growing out of the placer patent to Wells and Moyer. If that gave no title to the vein in controversy, plaintiffs had none. There is no assertion by them of prior possession, discovery, or claim to that vein, nor of any other right to it than that it is found beneath the surface of this placer patent. While the court refused to give this instruction, he did instruct the jury that defendants were naked trespassers, and added that "as to such

intruders the plaintiff's placer title might give a right of possession and recovery." He had previously said that this would be a question of some difficulty in a case where defendants had shown some right or interest in the lode, or an intention to claim the same according to local laws and the acts of Congress. If this made any difference in defendants' right as against the placer patent, then it appears to us that they did "show an intention to claim the *locus in quo* according to local laws and the acts of Congress," for they were working under the Crown Point and Pinnacle claims, which were legally established, and were pursuing the vein on which these claims were located. But the court held that the evidence showed that they were pursuing it when it passed out of the end lines of the claim instead of the side lines. It would seem that such possession as this ought to be sufficient to enable them to put the plaintiff upon proof of its title.

It is fair, however, to say that the court, in effect, affirms the doctrine that the patent for a placer mine (this patent) gives title to a vein or lode under its surface, though known to the original claimant or patentee at the time of the assertion of the claim and issue of the patent, and not disclosed to the land officers or mentioned in the patent, or in the original claim, as against one not having a superior title. The court says the evidence tends to prove that the lode in controversy was known to Wells and Moyer, grantees of the United States, at the time they made application for the placer patent under which plaintiff claims title; also that Stevens, a grantee of Wells and Moyer, and grantor of plaintiff, knew of the existence of the lode at the time the application was made for the patent, and procured the application to be made, with the intention to acquire title to the lode now in dispute. Yet, while the lode is not mentioned in the patent, the court held that for the purposes of this suit the title to it was conferred by that instrument. It appears to us that such a proposition is opposed to the policy of the acts of Congress in the different rules which it applies to granting titles to placer mines, and to vein, lode, and fissure mines, to the express language of the statute, and to the reservations in the patent itself.

It is not necessary to go further than an examination of chapter 6 of the Revised Statutes concerning the public lands,

to see this difference. An act of Congress of May 10, 1872, is the foundation of the existing system by which the citizen acquires right to the lands of the United States containing the precious metals, and its provisions are found in sections 2318 to 2336, inclusive. These sections, up to section 2328, relate mainly, if not exclusively, to mineral lodes or veins; and, among other things, they fix the amount or quantity of land which may be acquired under any one claim, the maximum of which is 1,500 feet along its length and 300 feet in width on each side of it, subject to further limitations under acts of the State legislatures and the mining rules of the district. The price for this when a patent is sought is five dollars per acre, as measured by the surface lines of the patent, and these lines must necessarily conform to the course of the vein, and not to congressional surveys. The owner of one of these veins may follow it outside of the perpendicular extension of the side lines of the claim, but not outside of its end lines. Placer claims, beginning with section 2329, are declared to include all other forms of mineral deposits, except veins of quartz or other rock in place, and may be entered on similar proceedings as those provided for vein or lode claims. The surveys for these shall conform as near as may be to congressional surveys, and may include in each claim 20 acres of superficial area; but when the location can not be made to conform to legal subdivision, it may be made as upon unsurveyed lands.

The most important part of the law in reference to the matter in hand is found in section 2333 of the Revised Statutes, which is as follows:

"Sec. 2333. Where the same person, association or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode; and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings;

and where a vein or lode such as is described in section twenty-three hundred and twenty is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of the vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

These varying provisions of the act of Congress as regards the two classes of mineral deposits and their surroundings are founded on the well-known difference in their character. The veins, lodes or fissures mentioned in section 2320 are found in the surrounding rock, and are described and defined in the case of the *Iron Silver Co. v. Cheesman*, (116 U. S. 481,) recently decided in this court. Placer mines, though said by the statute to include all other deposits of mineral matter, are those in which this mineral is generally found in the softer material which covers the earth's surface, and not among the rocks beneath. The one is only made available by following this vein into its stony case in the bowels of the earth, detaching and bringing it to the surface, and subjecting it to crushing, melting, and other processes by which the precious metal is separated from the ore of which it is a part. In the other, the more usual way is to take the soft earthy matter in which the particles of mineral are loosely mingled and by filtration separate the one from the other. It is very clear that Congress considered that the vein of mineral-bearing quartz was more valuable than the surface or placer deposit, and it accordingly, when a patent was asked, fixed the price of the former at five dollars and of the latter at two and a half dollars per acre, as represented by the superficial area of the survey. It also, for the same reason, limited the quantity of the former which any single claimant could obtain from the government in some cases to less than half of what he could obtain of the latter.

This was not done, as suggested by counsel, in special regard to the revenue of the government from this source, but to prevent too much of this rich public mineral falling into the hands of one successful explorer, to the exclusion of others.

But experience had shown that both these classes of mineral deposits might be found within the same survey of superficial area, and section 2333 makes specific provision for such a case. There was no difficulty in case of a patent for a lode or vein, for this necessarily must include both the surface by which it was measured and the vein beneath it; but in the case of a placer mine, whose deposits were superficial, there might be under it a vein of far more value than the 20 acres of surface mineral. A man cognizant of the existence of such a vein, who could, if he established his right to it as a lode, secure only a limited part of it, if he could cover it with a placer claim would thereby increase the quantity of this vein over what he could get by making a lode claim in double the amount, and in some cases, regulated by State or local mining laws, he might quadruple it. Congress also had to deal with the possibility that a vein might be discovered under the surface of a placer claim after the claimant had received his patent.

What Congress did, and intended to do, in the presence of these suggestions is, we think, very plain. It made provision for three distinct classes of cases: (1) When the applicant for a placer patent is at the time in possession of a vein or lode included within the boundaries of his placer claim, he shall state that fact, and on payment of the sum required for a vein claim, and 25 feet on each side of it, at \$5 per acre and \$2.50 for the remainder of the placer claim, his patent shall cover both. (2) It enacted that where no such vein or lode is known to exist at the time the patent is applied for, the patent for a placer claim shall carry all valuable mineral and other deposits which may be found within the boundaries thereof. (3) But in case where the applicant for the placer patent is not in possession of such lode or vein within the boundaries of his claim, but such a vein is *known to exist*, and it is not referred to or mentioned in the claim or patent, then the *application shall be construed as a conclusive declaration that the claimant of the placer mine has no right to the possession of the vein or lode claim.*

It is this latter class of cases to which the one before us belongs. It may not be easy to define the words "known to exist" in this act. Whether this knowledge must be traced to

the applicant for the patent, or whether it is sufficient that it was generally known, and what kind of evidence is necessary to prove this knowledge, we need not here inquire. It is perhaps better that these questions should be decided as they arise. They do not arise here, because the court took all this kind of evidence from the jury on the ground that defendants were trespassers.

It said in the charge, not only was there evidence that the vein was known to exist when the application was made by Wells and Moyer, but that *they* knew it, and that one of the parties in interest (Stevens) knew it, and procured the application to be made for the placer patent with the intent to secure this lode. There was here no question of sufficiency or character of the testimony as to the knowledge of the existence of this vein, but the jury was told that it was all immaterial, because in any event the patent carried the lode as against the defendants. The patent itself declares that it is subject to the following conditions: (1) That it is restricted to any lodes, veins, or other mineral-bearing quartz which *are not claimed or known to exist* at the date of the patent; (2) that should any such vein or lode be claimed or known to exist within the described premises at the date of the patent, the same is expressly excluded from it.

It is said that this part of the patent is void because there was no law which authorized its insertion, and because it is in conflict with the rights of the claimant of a placer mine under the acts of Congress. Without deciding on the effect of the acceptance, without protest, of a patent with such exceptions in the granting clause, where their insertion is the voluntary act of the officers who execute the instrument, it is sufficient to say that these conditions but give expression to the intent of the statute. We are of opinion that Congress meant that lodes and veins known to exist when the patent was asked for should be excluded from the grant as much as if they were described in clear terms. It was not intended to remit the question of their title to be raised by some one who had or might get a better title, but to assert that no title passed by the patent in such case from the United States. It remains in the United States at the time of the issuing of the patent, and in such case it does not pass to the patentee. He takes his surface

land, and his placer mine, and such lodes or veins of mineral matter within it as were unknown, but to such as *were known* to exist he gets by that patent no right whatever. The title remaining in his grantor, the United States, to this vein, the existence of which was known, he has no such interest in it as authorizes him to disturb any one else in the peaceable possession and mining of that vein. When it is once shown that the vein *was known to exist* at the time he acquired title to the placer, it is shown that he acquired no title or interest in that vein by his patent. Whether the defendant has title, or is a mere trespasser, it is certain that he is in possession, and that is a sufficient defense against one who has no title at all, and never had any.

The judgment of the circuit court is reversed, and the case remanded to that court, with instructions to set aside the verdict and grant a new trial.

WAITE, C. J. (*dissenting*).—I am unable to agree to this judgment. The facts briefly stated are these: The mining company holds title under a patent for a placer claim. Within the boundaries of this claim, as located on the surface and extended vertically downward, is a vein or lode. The existence of this vein or lode was known when the patent under which the mining company holds was issued, but it had not then, nor has it now, been located as a vein or lode claim. Neither Reynolds nor Morrissey has any title to or claim upon the lode within the boundaries of the placer claim. They are mere intruders, having wrongfully, and without any authority of law, worked from an adjoining claim under the surface of the placer claim of the mining company and taken possession of the mineral in the lode. Under these circumstances it seems to me the mining company has the better right. The question is not whether the company owns the lode or vein, nor whether it has the right to take mineral therefrom, but whether, as against a mere intruder, it has the better right to the possession. By the express provision of Rev. Stat., Sec. 2333, the patent under which the company holds gives it no right to the possession of any vein or lode *claim* within the boundaries of the placer patent, but as yet no such *claim* exists. There is a lode or vein, but no one has either claimed or attempted to

claim it. Quite different questions would arise if Reynolds or Morrissey were attempting to locate a lode claim within the boundaries of the placer patent upon a lode known to exist when the patent was applied for. In my opinion the charge of the court was right, and the judgment should be affirmed.

GREGORY ET AL. V. PERSHBAKER ET AL.

(73 California, 109. Supreme Court, 1887.)

Gravel deposit or stratum no lode. A mineral lode, as that term is used by miners, and in the mining acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock, but does not include a deposit of gold bearing gravel, although the same lies between clearly defined strata of rock, and has an average drop of several degrees. Such a deposit of gravel is a placer, as that term is used by miners and in section 2329 of United States Revised Statutes.

¹ **Placer claims include all forms of deposit** excepting veins of quartz or other rock in place.

Placer location without discovery. The location of a placer mining claim is valid, notwithstanding no valuable mineral had been actually discovered in the land before the location was made.

Prior location against senior record. Where the local regulations of a mining district require that the boundaries of a mining claim shall be marked on the ground, and the notice of its location posted before it is recorded, priority as to the right of possession under conflicting locations is determined in accordance with the priority of marking the boundaries and posting the notices of the respective locations; and a location having the priority as to such acts will prevail over another location, although the notice of the latter was recorded prior to the marking of the boundaries and the posting of the notice of the former.

Appeal from Superior Court, Butte County.

Plaintiffs are grantees and successors in interest of Johnson and others, who, on December 14, 1882, located the Lucretia mining claim upon gold-bearing mineral land of the United States, in Butte County, California. Defendant, on December 22, 1882, filed his application for a patent to the Howard mining claim, which included a portion of the Lucretia loca-

¹ The land office patent, as placer claims, oil lands (9 Land Owner 51; 10 Id. 307); rock quarries (11 Id. 213); alum, asphaltum, borax, soda, sulphur (9 Id. 210); kaolin (9 Id. 165, 10 Id. 88); but not salines (13 Id. 53).

tion. Plaintiffs brought this action, under sections 2325 and 2826, Rev. St. U. S., to have the question of right of possession of the claim determined. The Magalia Mining Company, by leave of the court, intervened, claiming an interest in the location through defendant. The court found that neither plaintiffs, defendant, nor intervenor had any title. Plaintiffs appealed. Other facts are sufficiently stated in the opinion.

A. L. HART, WM. SINGER, JR., and H. V. REARDAN, for appellants.

HUNDLEY & GALE, W. C. BELCHER, and W. H. H. HART, for respondents.

McKINSTRY, J.

1. It is contended by the defendant and the intervenor (respondents) that the mineral, if any, found in the land claimed by the plaintiffs herein, constitutes a "lode" within the meaning of the acts of Congress; that ledges or lodes can be located only in a manner entirely different from the mode adopted by plaintiffs' predecessors; and therefore, however regular their surface location might have been as a location of a "placer claim," it is invalid because no placer exists within its limits.

Finding No. 51 of the court below is as follows: "That in the year 1856, John Barrett, and others associated with him, discovered on the westerly bank of Little Butte Creek, on the southeast quarter of said section 13, a thin seam of gravel cropping out between an underlying bed of slate rock and an overlying bed of lava rock; and, finding that the said seam of gravel was gold-bearing, located the same as and for a mining claim under the name and designation of the 'Burch and Barrett Claim,' and thereupon commenced to work and develop their said claim by excavating a tunnel into the hill, following the course of the channel, and the said channel became thicker and better developed and more valuable as they pursued and explored the same into the hill, and showed that the said deposit was a well-developed channel, varying from a few inches to eight and ten feet in thickness, and from eight or ten to forty feet in breadth, with a well-defined bed and side walls of

slate rock, and capped by a thin stratum of clay, with an overlying body of lava rock for hanging wall. Prior to the year 1879 the said John Barrett, by mesne conveyances from his associates in said location, became sole owner of the said Burch and Barrett location, and in that year sold and conveyed the same to the intervenor, the Magalia Gold Mining Company, a corporation duly formed and organized under the laws of the State of California, and the said intervenor thereupon entered into and took, and thence hitherto has kept and held, and still holds, the possession, and has ever since continued the work of exploring and pursuing and working and mining the said gravel deposit in and along the said channel or bed, and had, in the spring of the year 1882, pursued and opened and worked the said gravel channel or bed in said southeast quarter of said section 13, and in the direction of the said southwest quarter of said section, and had discovered that the said gold-bearing channel extended toward and probably into the said southwest quarter, and that the said southeast quarter of section 13 contained deposits of gold-bearing gravel, in quantity sufficient not only to pay for working and mining the same, but sufficient to render the said quarter section of great value for mining purposes. That, after the commencement of this action, the said Magalia Gold Mining Company projected and extended its tunnel, mentioned in these findings, into said southwest quarter of said section 13, following the said gold-bearing deposit or channel. That said channel in its course into the hill descends or drops at an angle on an average of about eight degrees. That the bed-rock of said channel, during its entire length, so far as worked, is composed of a slate formation, and upon that slate formation said gravel rests, and over said gravel is a formation of clay gouge, overlapping said mineral deposit, and that above said clay seam is the lava which extends to the surface; and that the overlying lava rock, at the point where the said channel crosses the easterly line of the said southwest quarter aforesaid, is about six hundred feet in thickness. That said gravel is of a hard nature, and in mining and extracting the same has to be detached from its position by the use of picks and gads, and, when extracted, is taken out to the surface, and there washed, and in so washing gold is extracted therefrom. That neither gold nor any other mineral was dis-

covered within the boundaries of said southwest quarter of said section 13 until the said tunnel of said Magalia Company penetrated therein, as aforesaid. That said pay-streak of gravel and deposit does not crop out at any other place or places than the place where the same was discovered, as aforesaid; and that the same can not be seen or reached without entering the works of the said Magalia Gold Mining Company and following the trend and meanderings of said channel to the present face of the mineral deposit, except by sinking a shaft or running expensive tunnels other than those run, occupied and used by the intervenor therein."

In support of their view, counsel cite *Eureka Case*, 4 Saw. 302, and other decisions following and referring to that. In the *Eureka Case*, Mr. Justice FIELD, of the Supreme Court of the United States, said: "We are of opinion that the term [lode], as used in the acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, 'all deposits of mineral matter found through a mineralized zone or belt, coming from the same source, impressed with the same forms, and appearing to have been created by the same processes.'" This definition would not include a bed of gravel from which particles of gold may be washed. The words "mineralized rock" were evidently intended to qualify the last as well as the first sentence. That which in the *Eureka* case was declared to be a "lode" was a zone of *limestone* lying between a wall of quartz and a seam of clay or shale, the one having a dip of 45 degrees and the other of 80 degrees.

Section 2320 of the Revised Statutes of the United States (1873-74) treats of "mining claims upon veins or lodes of quartz or other rock in place bearing gold;" section 2322, of veins, lodes, and ledges "the *top or apex* of which" lies inside of surface lines extended vertically downward.

In Soane's *Neuman and Barretti* (by Velazquez) a "placer" is said to be "a place near the bank of a river where gold dust is found." In the last edition of Webster, which gives the meaning of the term as approved by usage in Mexico and California, it is defined: "A gravelly place where gold is found, especially by the side of a river, or in the bed of a mountain

torrent." Whatever the origin of the subterranean channels containing gravel beds, they have long been known to exist in California, and they have been generally supposed to be, and generally spoken of as the beds of ancient rivers in which the gravel was deposited by fluvial action, and which were either from their beginning subterranean, or upon which the superincumbent earth or rock has been hurled by means of convulsion, caused by volcanic or other natural force. That the bed of gravel mentioned in the findings, to the limited extent it has been prospected by the intervenor's tunnel, "descends or drops on an average of about eight degrees," does not of itself make the gravel deposit a lode with "a top or apex," nor contradict the theory that the channel was the channel of a mountain stream or torrent.

The terms employed in the acts of Congress are used in the sense in which they are received by miners. *The Eureka Case, supra*. Moreover, by express enactment, "claims usually called placers" are declared to include all forms of deposit, "excepting veins of quartz or other rock in place." Rev. St. U. S. § 2329. Referring to the common use of the word by miners, to the dictionaries, and to the adjudications of courts, the gravel bed with gold therein, as described in the finding, is a placer.

Other findings of the court below strengthen this conviction. The court found that for a long time the land which is the subject of this action was generally reputed and understood throughout the mining district in which it is, to be valuable placer mining ground, through which ancient channels, containing gravel-bearing gold in paying quantities, extended. (No. 13.) While it does not appear, except inferentially, that ground like that in controversy was generally located as placer, neither does it appear that there were district laws with respect to locations of veins, lodes or ledges; and, on the other hand, the district laws with reference to the location of flat and placer claims are set out in the findings at length. It further appears that the intervenor attempted to locate the ground as and for a placer claim, and its application for a patent was based on that location.

2. If the ground located by those under whom plaintiffs demurr was not previously located as a placer claim, and the

plaintiffs or their predecessors fully complied with the acts of Congress and the local rules and regulations, the plaintiffs would seem to have the right of possession. There is no finding of any local law which provides for the location of placers, or beds of gravel containing precious metals below the surface, as tunnel claims, or of facts showing that the grantors of the intervenor, who constructed the tunnel, pursued the mode laid down by local laws in locating it. As to any claim to the possession based on occupancy by the tunnel of a portion of plaintiffs' location, such occupancy, if it could be considered at all under the statutes, would extend only to the space within the walls of the tunnel, and could not be extended beyond them by any rule of constructive possession. We are not required, therefore, to interpret the section of the act of 1872 (Rev. St. U. S. 2344) which reads: "Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws," if, indeed, that provision refers to any rights other than those acquired under the act of 1866 and under the act of 1870, "granting to A. Sutro the right of way," etc.

The claim and location of plaintiffs "was distinctly marked on the ground, so that its boundaries could be readily traced." Rev. St. 2324. The mining laws of the district provided: "A notice shall be posted in a conspicuous place on each claim, or body of claims, describing the same with convenient certainty, and shall be recorded by the district recorder in his office, or in the office of the county recorder of Butte County." "All records of mining claims shall contain the name or names of the locators, and such a description of the claim or claims located, by reference to some natural object or permanent monument as will identify them." The last requirement is substantially a transcript from the United States Statute. Rev. St. 2324. The location by plaintiffs' predecessors in interest conformed strictly to the law with respect to the posting and registration of notices and their contents.

It is insisted by counsel for respondents that no location of mineral land is valid unless valuable mineral had been actually discovered in the land before the location was made. As to placer claims, we find no such condition in the acts of Congress, in the local laws, or in the practice of miners ; but, if

the laws contemplated discovery before location, it would seem from finding 51, above quoted, that here the discovery preceded the location. Of course, a patent for mineral lands can only issue under the acts of Congress relating to the disposition of mineral lands, on proof that they are such.

3. It is contended that the intervenor had already located the same ground as a placer. The intervenor's notice of location was *recorded* December 5, 1882. The plaintiffs' claim was marked on the ground. The marking was commenced on the thirteenth and completed on the fourteenth of December, 1882. Plaintiffs' notice was posted in a conspicuous place on their claim on the said fourteenth of December, and was recorded by the district recorder on the sixteenth, and by the county recorder on the twentieth of the same month.

On the said 14th of December, and after the boundaries of plaintiffs' claim were fully marked on the ground, the intervenor's notice of location (which described its claim by boundaries coterminous with plaintiffs' claim, and which had been so as aforesaid recorded on the fifth day of December) was posted on the claim. And on the said 14th of December, the intervenor proceeded to mark its claim on the ground in such manner as that its boundaries could be readily traced by blazing trees and driving painted stakes along the same lines already marked by the plaintiffs.

If the rights of the parties hereto are to be determined by reference simply to what was done by them or their grantors on the surface and in the recording office, and without regard to work, if any, done in intervenor's tunnel within the limits of the claim, the plaintiffs would seem to have the better right. The facts that the intervenor recorded a notice containing a description of the claim by reference to government subdivisions, and posted a copy thereof outside of the limits of the claim as described in the notice, were not of themselves such acts as that the subsequent marking of the boundaries related to the record or posting of the notice, so as to cut out any rights of plaintiffs acquired by compliance with the statute and district laws. The local laws seem very clearly to provide that the designation of the boundaries on the ground and posting of the notice shall precede its record. In the land office, where the question between the applicant for a

patent and the United States is the right of the applicant to purchase, the order in which are done the several acts which give the right to purchase may be immaterial. And so in an action in the State court, where only one of the parties claims to have complied with the laws, the order of the acts done by him may be immaterial. But in an action where both parties claim to have made locations, in themselves valid, and the question is which of the two has made the *prior* location, the prior actual or constructive possession, evidenced by posting the notice and by marking the boundaries in the manner required by statute, must prevail; at least unless there has been unreasonable delay in recording the notice, even if it be conceded that a failure to record the notice will invalidate a location otherwise regular. It can not be said here that the plaintiffs unreasonably delayed the record.

The act of Congress does not in express terms require the posting or registration of a notice, but recognizes the power of the miners to require the registration by providing that all records of mining claims shall contain a certain description, etc. The miners are warned that a tract of land is claimed, by the posted notice and the evidence of its boundaries made necessary by the statute. They are not required to search the records in the first instance. A recorded notice gives no information of a claim not actually located. Nor does even a notice posted on the ground, unless it appears that the party posting it is proceeding to indicate with reasonable diligence, or is about to indicate the boundaries by marking them.

It may be asked: Suppose work is being actually prosecuted on or in the ground, and a struggle ensues between the person doing the work and another party, each striving to secure a precedence in marking out the boundaries of a claim to include the place where the work is being done, can the mere fact that he who has done nothing toward extracting ore, or developing the ground, first completes or first commences the marking of the boundaries, give to him the right of possession? In such case, would the performance of the only work done in the mine, the record of a notice defining the limits of a claim including the work, and the posting of the notice *near* the claim, as described in the record, go for naught? Although merely working at a particular place or

places gives no right to patent under the statutes of the United States, and would not, under the local law, proved herein, extend by construction the actual possession, yet, as to a third person who has not complied with the statutes and local laws, the person doing work, or who has done work not abandoned, has an actual possession to the extent of the work done.

We have said that, as between two persons, neither of whom had done any work before his attempted location, and both of whom claim to have made valid locations, the issue must be determined by reference to priority in the statutory designation, on the surface, of the limits of the claim. Of course, we are not to be understood as saying that a claim can be *held*, prior to the patent, without work subsequent to the formal location within it, in case no work was done before. That is not a question involved in this case. But, in determining the question of priority in the particular referred to, it may be possible that the person doing work in the ground, and who has indicated by his acts his intention to perfect a location under the mining laws and statutes, should be held, by proper application of the doctrine of relation, to have first marked the boundaries of the claim, in legal effect, as against one who, for the purpose of depriving him of the benefit of his work, or of his discovery of mineral of value, shall intervene and mark the boundaries before the first occupant shall have completed or even commenced their alignment. But no such question is distinctly presented by the findings herein; and, as we think the interests of justice demand a new trial of the action, we decline to express any opinion upon a suppositive case.

Judgment reversed, and cause remanded for a new trial.

TEMPLE, J., and PATTERSON, J., concurred. Hearing in bank denied.

¹ NOYES, Appellant v. MANTLE ET AL., Appellees.

(127 U. S. 348. Supreme Court, 1888.)

A placer patent does not pass title to a lode discovered, located, and recorded before the date of the application for a placer patent; and it is immaterial whether or not the existence of such lode or of the location thereon was known to the placer applicant.

² **The government holds the title in trust for those who locate veins on the public domain and for their vendees.**

Appeal from the Supreme Court of Montana.

Bill in equity to quiet title. Decree of perpetual injunction against defendants, from which they appealed to the Supreme Court of the territory. The decree and judgment being affirmed there, they appealed to this court. The case is stated in the opinion.

THOS. L. NAPTON, for appellant, submitted on his brief.

S. S. BURDETT, for appellees.

Mr. Justice FIELD delivered the opinion of the court.

This is a suit in equity to determine the adverse claims of the defendant below, appellant here, to a certain quartz lode mining claim, known as the Pay Streak lode, in Summit Valley Mining District, in the county of Silver Bow, in the Territory of Montana. The plaintiffs below assert title to the claim as grantees of Daniel Zinn and John O. McEwan, who discovered and located it on the 23d of April, 1878, under the provisions of the act of Congress of May 10, 1872, 17 Stat. 91, c. 152, which are re-enacted in the Revised Statutes, title 32, chapter 6.

The defendant below asserts title to the lode claim under a patent of the United States issued to him on the 23d day of April, 1880, for a placer mining claim, which includes that lode within its boundaries. The application for the patent was made December 14, 1878.

Several interrogatories touching matters in issue were submitted to a jury called by the court, though sitting in the

¹ S. C. below, 5 Pac. 856.

² U. S. v. Freyberg, 32 Fed. 195.

exercise of its equity jurisdiction. Their findings in answer to the interrogatories were, with one exception, adopted by the court. The excepted finding gave an erroneous date to the application of the defendant for the patent, and was therefore set aside. The court thereupon found the fact as to the date as it appeared from the evidence. Upon the facts thus established the court rendered its decree. They were substantially these: That on and prior to December 14, 1878, a vein or lode of quartz, bearing gold and silver, was known to exist in the ground in controversy; that its existence could have been readily ascertained by any person examining the ground with an honest purpose to inform himself of the fact; that in the month of April, 1878, Zinn and McEwan, the grantors and predecessors in interest of the plaintiffs, discovered in the ground a vein or lode of quartz bearing gold and silver, and they posted a notice claiming the ground, and the vein or lode which it included; that at the same time they marked off the ground by stakes so that its boundaries could be readily traced; that they named the claim in their notice of location as the Pay Streak lode, and within twenty days after its discovery filed in the proper office of the county a notice of their claim, and of its location, such as was usual where lode claims were located in that mining district; that in July, 1881, they conveyed to the plaintiffs all their interest in the claim; that in August, 1881, before the commencement of this suit, the plaintiffs caused a survey of the claim to be made, and its boundaries marked so as to be readily traced; that they then re-located the claim, of which notice, within twenty days thereafter, was filed in the recorder's office of the county; and that they were in its possession at the commencement of this suit.

The jury did not find that the existence of a vein or lode in the ground in controversy was known to the defendant at the time of his application for a patent, and reported that they were unable to agree on this point. The district court, in which the suit was brought, did not consider that this want of a finding on the question of knowledge by the defendant affected the position of the plaintiffs, and it rendered a decree adjudging that the right of possession to the lode claim was in them, and that the defendant had no title, estate or interest therein, and that he be enjoined from asserting or claiming

any as against them. The Supreme Court of the Territory affirmed the decree, holding that the title to the lode mining claim had passed to the grantors of the plaintiffs by their discovery and location under the statute, and that the subsequent patent to the defendant of a placer claim did not affect their title to the lode claim, for that title was not then subject to the disposition of the government. The court also held that the lode claim was known to exist within the meaning of the statute when it had been located pursuant to its requirements, whether knowledge of its existence was possessed or not by the defendant at the time he made his application for a patent. These rulings constitute the only matters meriting consideration in this court.

Section 2322 of the Revised Statutes, re-enacting provisions of the act of Congress of May 10, 1872 (17 Stat. 91), declares that the locators of mining locations previously made, or which should thereafter be made, on any mineral vein, lode, or ledge on the public domain, their heirs and assigns, where no adverse claim existed on the 10th of May, 1872, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations, not in conflict with those laws governing their possessory title. There is no pretense in this case that the original locators did not comply with all the requirements of the law in making the location of the Pay Streak lode mining claim, or that the claim was ever abandoned or forfeited. They were the discoverers of the claim. They marked its boundaries by stakes, so that they could be readily traced. They posted the required notice, which was duly recorded in compliance with the regulations of the district. They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued the government held the title in trust for the locators or their

vendees. The ground itself was not afterward open to sale. The location having become completed in April, 1878, antedates by some months the application of the defendant for a patent for his placer claim. That patent was subject to the conditions of section 2333 of the Revised Statutes, which is as follows:

"Where the same person, association or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section 2320, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

This section was before us for consideration in *Reynolds v. Iron Silver Mining Company*, at October term, 1885 (116 U. S. 687), and also at the present term (124 U. S. 374). As stated by the court at both times, it makes provision for three classes of cases:

1. When one applies for a placer patent, who is at the time in the possession of a vein or lode included within its boundaries, he must state the fact, and then, on payment of the sum required for a vein claim and twenty-five feet on each side of it at \$5 an acre, and \$2.50 an acre for the placer claim, a patent will issue to him covering both claim and lode.

2. Where a vein or lode, such as is described in a previous section, is known to exist at the time within the boundaries of the placer claim, the application for a patent therefor, which does not also include an application for the vein or lode, will be construed as a conclusive declaration that the claimant of the placer claim has no right of possession to the vein or lode.

3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral and other deposits within its boundaries.

The section can have no application to lodes or veins within the boundaries of a placer claim which have been previously located under the laws of the United States, and are in possession of the locators or their assigns; for, as already said, such locations, when perfected under the law, are the property of the locators, or parties to whom the locators have conveyed their interest. As said in *Belk v. Meagher* (104 U. S. 279, 283): "A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent." It is not, therefore, subject to the disposal of the government. The section can apply only to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned, and are known to exist, the applicant for the patent must include them in his application, or he will be deemed to have declared that he had no right to them: *Sullivan v. Iron Silver Mining Co.*, 109 U. S. 550, 554.

When can it be said that a vein or lode is "known to exist" within the meaning of the section? In *Reynolds v. Iron Silver Mining Company*, when first here, the court said that it might not be easy to define the words "known to exist," and as it was not necessary to determine whether the knowledge must be traced to the applicant for the patent, or whether it was sufficient that it was generally known, and what kind of evidence was necessary to prove this knowledge, it was better that the questions should be decided as they arise. When the case was here a second time, the court said that the language of the section appeared to be sufficiently intelligible, in a general sense, and yet it became difficult of interpretation

when applied to the determination of rights asserted to such veins or lodes, from the possession or absence of knowledge at the time application is made for a patent, and that if a general knowledge of their existence were held sufficient, the inquiry would follow as to what would constitute such knowledge, so as to create an exception to the grant, notwithstanding the ignorance of the patentee. These suggestions indicated the difficulties of some of the questions which might arise in the application of the statute; but in the present case we think that difficulty does not exist. Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode.

A copy of the patent is not in the record, so we can not speak positively as to its contents; but it will be presumed to contain reservations of all veins or lodes known to exist, pursuant to the statute. At any rate, as already stated, it could not convey property which had already passed to others. A patent of the government can not, any more than a deed of an individual, transfer what the grantor does not possess.

Judgment affirmed.

1. A placer patent conveys lodes afterward discovered: *Raunheim v. Dahl*, 9 Pac. 892. The knowledge of a lode within 300 feet of a placer is no proof that it was known in the placer: *Id.*

2. Annual labor is required on placers: *Sweet v. Webber*, 7 Colo. 443; Note 3 *ante*, 349.

3. There is no limit to the number of acres which may be patented under one placer application: *Tucker v. Masser*, 113 U. S. 203; *St. Louis Smelting Co. v. Kemp*, 11 M. R. 673.

4. The size of a placer claim may be limited by district rules: *Rosenthal v. Ives*, 15 M. R. 324.

5. As to what are known (coal) mines, see *U. S. v. Mullan*, 10 Fed. 758 and notes, *ante*, 590.

PAGE ET AL., Appellants, v. SUMMERS ET AL., Respondents.

(70 California, 121. Supreme Court, 1886.)

Prospecting contract rescinded between discovery and location. Where an agreement to prospect for and locate lodes for the benefit of all the parties thereto has been dissolved by mutual consent, none of the parties are under obligations to complete locations already initiated for the benefit of the concern. And if some of them do so the locations are for their sole benefit.

Appeal from a judgment of the Superior Court of Mono County and from an order refusing a new trial.

On the 15th of April, 1881, the plaintiffs and the defendant Young entered into a contract for the purpose of prospecting for and locating mines in the Patterson Mining District in Mono County, California. The contract remained in force until the 12th of May, 1881, when it was terminated by mutual consent. Immediately after the execution of the contract, Frost and Young, two of the parties thereto, discovered a mineral vein in the mining district, and on or about the 27th of April, 1881, located a claim thereon known as the "Kentuck." The notice of location named the plaintiff Page and the defendant Young as the locators. On the 5th of May, 1881, they located another claim on the vein, the notice of location of which named Page, Frost and another of the prospecting party as the locators. From the 27th of April, 1881, to the 19th of May, 1881, Frost and Young worked continuously upon the latter claim. On the 14th of May, 1881, while Frost and Young were at work upon the Kentuck claim, they tore down the notice of location of April 27, 1881, and substituted another notice claiming the same ground, signed by G. M. Summers and Matt. Young as locators and designated the claim as the "May Bell." On the 19th of May, 1881, they tore down the notice of location of May 5, 1881, and substituted another therefor, signed by J. N. Summers and Frost as locators, and designated the claim as the "Georgie Howell." The action was brought to determine the rights of the parties

in the several locations, and to compel conveyances in accordance therewith. The complaint alleged that the defendants G. M. and J. N. Summers had notice of the prospecting agreement, and of the work done thereunder. The defendants claimed title under the "May Bell" and "Georgie Howell" locations. Judgment was rendered in favor of the defendants. The further facts are stated in the opinion of the court.

STEWART & HERRIN, H. L. GEAR, ROBERT M. CLARKE, and J. A. McQUAID, for appellants.

BENNETT & REDDY, for respondents.

McKINSTY, J.

The court below found "that on the twelfth day of May, 1881, the said J. H. Page withdrew from the said prospecting company, and the said prospecting company *was dissolved, and the said prospecting agreement was terminated between all the parties thereto.*"

It is insisted by counsel for appellants that the parties to the prospecting contract were *partners*, or at least occupied a fiduciary relation toward each other, like that existing between partners; that it was the duty of Frost and Young to complete the defective locations commenced before the dissolution, and that the subsequent locations made by Frost and Young should be treated precisely as if they were the completion of their prior attempted locations; that neither Frost nor Young could get rid of his obligation to complete the original locations by removing the original notices and posting others, and marking the boundaries of the claims asserted in the notices last posted. Further, that G. M. and J. N. Summers, who took with notice of the prospecting agreement, should be held as trustees.

Where a partnership has contracted engagements which can not be fulfilled during the time limited for its existence, the partnership continues for the purpose of performing such outstanding engagements, and of taking and settling all accounts, and converting the property, means and assets of the partnership existing at the time of its dissolution, and for these purposes the authority of each member of the firm remains the

same after as before the dissolution: *Robbins v. Fuller*, 24 N. Y. 570; *Murray v. Mumford*, 6 Cow. 441; *Western Co. v. Walker*, 2 Iowa, 504.

The interest of the parties herein in the completion of the defective locations, ought not to be estimated by reference to events which happened after the termination of the agreement, even if it appeared that the rights acquired by the subsequent locations were valuable. The agreement was made in Mono county, the mines located were within that county, and, for aught that appears, all the parties to the agreement resided there. There is no finding of the concealment of any fact from the plaintiffs. It must be presumed that, with full knowledge of the existing conditions, all parties to the agreement terminated it, and dissolved the contractual relations arising from it. Page, Fulmore and Blake may have concluded that the ground was valueless, or that it would be fruitless to complete the locations or to expend money in developing them. Whatever motive may have influenced them, they saw fit to dissolve the company and end the agreement and enterprise. It may be conceded that the parties to the prospecting contract might, had they deemed it for their interest to do so, have completed the locations previously commenced within a reasonable time, and that they would have been protected during such reasonable time from the interference of third persons. But it was for them to determine whether it was advisable to complete the locations or abandon them.

None of them had contracted an obligation with the government or with any third person to be performed after May 12, 1881. No duty remained with any of them to acquire property not contracted for prior to the dissolution. They had acquired no inchoate interest in property which they were under obligation to complete, notwithstanding the dissolution. The plaintiffs (other than Frost) could not have been compelled to take a conveyance of aliquot portions of the ground subsequently located, nor were they liable to the actual locators for part of the cost of making the subsequent locations, nor subject to pay any part of the expense for work done under such locations. It may be added, the court below found that Frost and Young removed and destroyed the original notices. It

does not appear but this was done *after* the dissolution of the agreement, nor does it appear but it was done with the knowledge and consent of the other plaintiffs.

There are reasons, not necessary to mention, why (independent of the termination of the prospecting contract) none of the plaintiffs could demand a decree for a conveyance of any portion of the "Georgie Howell," located by Frost; why Frost is not entitled to any relief; why neither Frost nor Blake could enforce the agreement as against any of the mines located. Reasons, also, why, in any event, the defendants G. M. & J. N. Summers would hold two thirds of the "May Bell" and one half of the "Kentuck" free from any trust.

Judgment and order affirmed.

We concur: MYRICK, J.; ROSS, J.

CHADBOURNE V. DAVIS.

(9 Colorado, 581. Supreme Court, 1886.)

Inability of appellate court to review conflicting testimony. Where evidence is very conflicting, contradictory and unsatisfactory, only the court in whose presence it is given can correctly estimate its value. An appellate court can not.

¹ **Sufficient proof of abandonment of prospecting contract.** Where two persons enter into a contract, the one to prospect and the other to furnish the necessary provisions, do the discovery work, attend to the surveys, file certificates of location, etc., such contract, having been partly performed on both sides, can not be regarded as rescinded, unless the circumstances show an absolute abandonment. Proof of negotiations for an abandonment is insufficient to establish a rescission. But under the testimony the finding that the arrangement had been discarded before the making of the discovery in question, was upheld.

Appeal from District Court, Chaffee County.

This action grows out of an oral contract entered into by and between the plaintiff, Chadbourne, and the defendant, Davis, early in the month of June, 1881, by the terms of which Davis agreed to prospect for the discovery of mines during the summer season, and to locate his discoveries in the joint

¹ *Harvey v. Coffin*, 12 M. R. 336.

names of himself and Chadbourne; each to be the owner of an undivided half interest therein. In consideration of the services of Davis in the above capacity, Chadbourne agreed to furnish all necessary provisions, cash, and transportation necessary for prospecting. The plaintiff alleges full compliance with the terms of his contract, but alleges that while defendant was prospecting, using plaintiff's provisions, tools, etc., to wit, about August 6, 1881, he discovered the Madaline lode, in Gunnison county, which he caused to be staked and recorded in the names of defendant and one Linehan, three fourths thereof in the name of defendant, and one fourth in the name of Linehan, and refuses to recognize the one half interest therein justly owned by the plaintiff. The defendant admits the contract substantially as stated, except that he alleges that plaintiff further agreed to do the discovery work on claims discovered, sink shafts, have them surveyed, and certificates of location filed as required by law. He further alleges that he had discovered, up to August 1st, about nineteen claims, but plaintiff failed to comply with his agreement to improve, survey, and record them, and permitted them to lapse. Defendant also alleges that the contract was rescinded about August 1, 1881, and the defendant discharged; that he subsequently, on the sixth day of August, 1881, discovered the Madaline, and that plaintiff was not and is not interested therein. The plaintiff replies, denying the rescinding of the contract, and alleging performance of his agreement, including assistance to complete the discovery work on the Madaline. The trial was to the court without a jury, and the finding and judgment were for the defendant Davis.

HARTENSTEIN & SINDLINGER, for appellant.

RHETT & HOBSON and ROGERS & CUTHBERT, for appellee.

BECK, C. J.

The evidence throughout the case is very conflicting, contradictory and unsatisfactory. A court can only correctly estimate such testimony when given in its presence. We are of opinion that the evidence is sufficient to sustain the rescission of the contract, as to further prospecting for mines after

August 1, 1881. Several witnesses testify to it, and the testimony of the plaintiff is not in plain contradiction. He admits saying more claims had been discovered up to that date than could be worked; also that he told Davis he could not afford to work on every mineral streak he might discover, and other admissions of like import. The defendant, five or six days afterward, discovered the Madaline; and it is claimed their joint conduct concerning the discovery work, and their joint efforts to sell the claim, have an important bearing on the question whether it was discovered while the prospecting contract was still recognized by the parties as in force, or afterward.

The rule concerning the rescinding of such an agreement is that, unless the circumstances show an absolute abandonment of the contract as to future enterprises, proof of negotiations for an abandonment is insufficient to establish a rescission of the agreement. The parties can not treat the contract as binding and rescinded at the same time. But, when the entire testimony is considered, we are disposed to believe the finding of the court was correct, and that the contract was in fact rescinded. After the supposed rescission, which occurred at the village of Vicksburg, Chadbourne and Davis set out for Texas Creek, where the Mountain View and Madaline claims are situated. As they were ascending the hill Chadbourne says they sat down, and he asked Davis what he was going to do. He says Davis had procured stuff (probably meaning provisions) from Daniel Mero, and, not knowing what he was going to do, he wanted to have an understanding. He admits that he knew, before starting out with Davis, that he had procured his supplies from Mero, and says the object of his inquiry was to find out what Davis was going to do. This would indicate that they had not set out with an understanding to continue operations under their prospecting contract. Chadbourne went to the mines to perform labor on the Mountain View, and he claims that Davis was assisting him in this work when he discovered the Madaline. This fact, if true, would not establish Chadbourne's interest in the Madaline. The Mountain View had been discovered while the contract was in force, and it would be consistent for the parties subsequently to perform necessary labor thereon to perfect the location. But the Mad-

aline, discovered August 6th, would not come within the terms of an agreement already rescinded, and there is no evidence of any other agreement. The action of Davis in staking the claim in his own name alone at the time of its discovery, tends to show his understanding that the contract had been dissolved. Chadbourne did not even go to see the new claim until his next return to the camp, about the 17th of August, when, according to his testimony, he brought a man with him to buy this claim. He testifies that he assisted in performing the location work thereon; but his own testimony on this point is, to say the least, unsatisfactory, as it shows he remained in the camp a very short time during that visit. His strongest proof of a recognized interest in the claim is the testimony of Van Winkle, a witness introduced by him in rebuttal. This was the person whom Chadbourne claims to have taken over to buy this valuable mine. It seems to us, however, that the testimony of this witness is not in keeping with his assumed character as a purchaser of mines. Being sworn, and asked what his business was, he answered: "I prospect a little once in a while." Being asked what he went to Texas Creek for on the 16th or 17th of August, 1881, he answered that Chadbourne wanted him to go over and "take some interests and sink some assessments. * * * He showed me different claims after I got there and some ore, and wanted to know what I would give for some claims. One in particular was the Madaline, as he called it." Witness further states that, after some negotiations, Chadbourne and Davis each agreed to take \$1,500 for their respective interests therein; that they were then performing the location work on the claim. The stakes were set, and contained the name "Madaline;" but he remembers nothing more of the inscription. This witness admits that he could not purchase a \$3,000 claim but winds up by saying that the parties offered him \$50 each to find a purchaser. This evidence, when considered by itself, and also in connection with that given by B. F. Whitescarver and wife, who both swore positively that Chadbourne tried to hire the husband to testify for him in this case, is so unsatisfactory that we decline to disturb the finding of the district court, before whom the witnesses personally appeared.

The judgment will be affirmed.

JENNINGS ET AL. V. RICKARD.

(10 Colorado, 395. Supreme Court, 1887.)

The partnership relation is one of trust, and each member is held to a strict rule of good faith and fair and open dealing.

¹ **Partner buying out partner while concealing outside offer.** Defendants held in their names certain claims which had been taken up under a prospecting arrangement between themselves and the plaintiff. They bought out his interest at an agreed price, not disclosing an offer which had been made them by a stranger for one of the claims. After purchasing plaintiff's interest they sold out on this offer: *Held*, that plaintiff was entitled to recover his proportion of the excess in price received for this claim.

Concealing discoveries from outfitter. Defendants, while working under a prospecting contract, discovered lodes which they located but never mentioned to plaintiff, their outfitter. After a dissolution of the partnership arrangement they sold these claims for a large price: *Held*, that they were bound to account for plaintiff's proportion of the purchase money.

² **A prospector discovered "float"** but did not find the lode from which it came until after a dissolution of the prospecting partnership: *Held*, that his failure to follow up the prospect during the partnership would not of itself raise any inference of fraudulent behavior nor entitle his associates to share in the lode when afterward found.

The Statute of Limitations must be specially pleaded. It will not be considered when urged for the first time in the appellate court, and will not be noticed on a demurrer alleging generally that the complaint states no cause of action.

Error to District Court, Fremont County.

The defendant in error obtained a decree from the court below for \$20,200. The plaintiffs in error, the defendants below, bring the cause to the Supreme Court by writ of error. The facts of the case are sufficiently stated in the opinion of the court.

TELLER & ORAHOOD and J. M. WALDRON, for plaintiffs in error.

WELLS, SMITH & MACON, for defendant in error.

¹ *Keith v. Kellam*, 35 Fed. 243.

² *Page v. Summers*, 15 M. R. 617.

ELBERT, J.

Charles Rickard, the plaintiff below, on the 18th of December, 1882, filed his bill of complaint against the defendants, John and Daniel Jennings, claiming a decree against them for \$20,200, on account of certain partnership transactions. He alleges that in the fall of 1874 he and the defendants entered into a mining copartnership for the purpose of collecting mineral specimens, and also for the purpose of discovering, locating and developing lodes and mining properties; that by the terms of such copartnership agreement Rickard was to furnish certain moneys, horses, wagons, etc.; that the defendants were to do the active work in the field in prospecting and locating mining claims, and that each were to have a one third interest in all mining claims discovered and located by the defendants; that this copartnership continued until April, 1878; that during this time the defendants discovered and located the Mammoth, the Empire and the Trail lodes, and a certain claim to coal lands, and reported the same to plaintiff as properties belonging to the copartnership; that they reported the aforesaid lodes as being all that had been discovered, located and claimed by them during the continuance of the copartnership agreement. He alleges that on the 19th of March, 1878, he conveyed to said defendants, for the sum of \$400, all his interest in and to the foregoing copartnership properties. Concerning this conveyance of the 19th of March, 1878, he alleges a distinct and separate fraud upon the part of defendants Jennings, by reason of which he is entitled to a decree against them for \$200. This fraud concerns properties admittedly belonging to the copartnership, and will be considered first.

Under the terms of the copartnership, the lodes were located for convenience in the names of the defendants, and they were authorized to negotiate and sell them, accounting to plaintiff for one third of the proceeds. The evidence clearly shows that on or about the 19th of March, 1878, the defendants approached the plaintiff concerning a purchase of his third interest in the foregoing copartnership properties, and that the negotiation resulted in the sale by plaintiff to defendants of his third interest in the same for the sum of

\$400, which he then and there conveyed by deed of that date to defendants. It also quite clearly appears that at the time of this sale the defendants were negotiating a sale of the copartnership coal claim to one Smith for the sum of \$1,800. Although this sale to Smith was not consummated until some time thereafter, the deed to Smith, which was placed in escrow, bears date March 19, 1878, the date of the conveyance by the plaintiff to defendants on his one third interest in the copartnership properties. The one third interest of the plaintiff in the proceeds of the sale of this coal mine would have amounted to \$600—\$200 more than the defendants paid him for his entire interest in the four claims.

The partnership relation is a trust relation, and the members of a copartnership are held to a strict rule of good faith and fair and open dealing. He who assumes the relation invites the confidence of his copartners, and pledges fidelity to the interests of the copartnership. The requirements of the copartnership relation which the defendants sustained to the plaintiff demanded that, at the time of the negotiation for a sale of his third interest in the copartnership properties, they should have made known to him the negotiation which was then pending with Smith for the sale of the coal claim for the sum of \$1,800. Their concealment of this negotiation from the plaintiff was the concealment of an important fact, affecting the value of plaintiff's copartnership interest for which they were negotiating. It enabled them to deal with him on unfair and unequal terms. It was a fraud, and equity and good conscience required that defendants should account to plaintiff for one third of the proceeds of that sale.

The sale by plaintiff to defendants of his one third interest in the copartnership properties, to wit, the Mammoth, the Empire and the Trail lodes, and the coal claim, was a sale in gross for \$400. The consideration paid for each property respectively does not appear. As the plaintiff introduced no evidence upon this point, and only prayed in his bill of complaint that the defendants be decreed to account for the sum of \$200, the difference between the entire consideration paid him for the whole property, and his third interest in the proceeds of the sale of the coal claim, the court was justified in limiting its decree in this behalf to that sum.

Secondly. The plaintiff alleges another and distinct fraud respecting certain mining properties, which he claimed belonged to the copartnership, a claim which the defendants contest. Plaintiff alleges that, during the continuance of said copartnership agreement, the defendants discovered and located certain other mining claims, viz., the Cliff, the North Star, the Hiawassee, the Galena, the East Wing, the Buckeye, and the Sylvanite; that under the terms of their copartnership agreement he was entitled to a one third interest in the same, but that the defendants fraudulently concealed from him the discovery and location of said claims, and that he never knew of the existence of said claims, or of his rights therein, until on or about the 27th day of September, 1879, when the defendants sold and conveyed said claims to one Ballentine for the sum of \$60,000. By reason of this fraud upon the part of defendants, the plaintiff claims a decree for \$20,000, one third of the proceeds of said sale to Ballentine.

The defendants, in their answer, deny the copartnership, except as thereafter stated, and "thereinafter" they say "that they, the defendants, further answering, admit that they entered into an agreement with plaintiff to gather specimens and prospect for lodes, substantially as set out in the complaint, and that such agreement continued until the early part of the year 1878." They set forth the sale and deed of the 19th of March, 1878, by plaintiff to defendants, and say "that, upon the completion of such sale by plaintiff to defendants, it was then and there agreed by and between them that all former associations, agreement, copartnership and business relations theretofore existing between plaintiff and these defendants should cease, and the same were then and there fully dissolved and terminated." In view of the testimony as will be seen, this is an important admission. They deny any fraudulent concealment of lodes discovered and located as alleged in the complaint, but claim that the Mammoth, the Empire, the Trail lodes, and the claim to coal lands, reported by them to plaintiff as copartnership properties, were all the lodes discovered and located by them during the continuance of the copartnership, from the fall of 1874 to the spring of 1878.

Upon the admissions of the defendants in their answer and testimony, the Cliff, the Hiawassee, the Galena and the North

Star must be treated, without hesitancy, as properties belonging to the copartnership. The defendants, in their answer, admit that the copartnership formed in 1874 continued until the spring of 1878. The copartnership must be treated as extending to all mining properties discovered and located by the defendants during that period, in the absence of any limitation. John Jennings admits in his testimony that the four lodes named were discovered and located in 1876 and 1877. The defendant, Daniel Jennings, while he does not testify upon this point, does not in any way controvert or disclaim it. It is true that they both claim in their testimony that they understood that the copartnership was dissolved in the spring of 1876, when the copartnership "specimen store" was sold; but this testimony does not support the allegations of the answer, the admissions of which, upon this point, must be held to control.

It appears from the testimony that these four mines belonged to the group of ten which were sold to Ballentine for the sum of \$12,000. There is no evidence fixing the separate value of the mines which constitute this group. In the absence of any evidence upon this point, the respective mines constituting the group must be treated of equal value. In so far, therefore, as the decree of the court below, based upon the right of the plaintiff to recover one third of the proceeds arising from the sale of the Cliff, the Hiawassee, the North Star and the Galena is concerned, we think it is justified by the pleadings and the evidence.

It appears that three other mines which plaintiff claims belong to the copartnership, viz., the Sylvanite, the Buckeye and the East Wing, were at the same time, namely, on the 27th of September, 1879, conveyed to Ballentine by a separate deed, and that the true consideration therefor was \$18,000. This sum, together with the \$12,000 for which the other group sold, constitutes the \$30,000 for the one third of which plaintiff claims a decree.

It remains, therefore, to determine whether, upon the evidence, these three mines belonged to the copartnership. The two Jennings and other witnesses testify positively to their discovery and location in 1879, after the copartnership had been admittedly dissolved. It appears that the Sylvanite

was by far the most valuable of the three; that the other two were not regarded as of much value. There was an effort upon the part of the plaintiff to show that, while the Sylvanite was not located until 1879, it was really discovered by the Jennings during the existence of the copartnership, and its discovery fraudulently concealed from the plaintiff. Daniel Jennings admits in his testimony that some years prior to 1879, while prospecting, he discovered some "float" upon the mountain side some four or five hundred feet from where the Sylvanite was afterward discovered, and that he stuck a stake there to indicate the locality, with a view of returning at some future day to prospect for the vein from which it came, but that he never did return to renew his search until 1879. Other witnesses testify to substantially the same admission on his part. At the worst, this was but a neglect upon his part to pursue a search that might have terminated beneficially to the copartnership. His failure to do so, however, does not appear to have been fraudulent. It is not shown that, at the time he stuck the stake where he found the "float," he discovered the vein from which it came, or that he had any knowledge respecting it that would render his failure to make further search for the mine fraudulent. Such and other indications of the existence of mineral veins are frequent in the path of the prospector. All that can be required of him is that he pursue his search with diligence and good faith. His failure to follow up a particular "float," or other indication of a lode, is not a fraud as of course. It will not do to say, under the circumstances of this case, that Jennings, after the dissolution of the copartnership, could not return to and prospect in Elk Mountain district for other lodes, except at the peril of having to yield to plaintiff a one third interest in their discoveries, upon the proposition that by proper diligence they might have discovered such lodes during the existence of the copartnership. The evidence does not show the fraudulent concealment of a discovery, as in the case of the other group of mines.

In so far, therefore, as the decree of the court below was based upon the rights of the plaintiff to recover one third of the proceeds arising from the sale of these three mines, we do not think it justified by the evidence.

The argument that the action is barred by the Statute of Limitations can not be considered. The objection is taken for the first time in this court. The defense was not interposed in the court below, by either demurrer or answer. This defense is in the nature of a special privilege, and if not specially pleaded must be treated as waived. It can not be considered under the general objection that the complaint does not state facts sufficient to constitute a cause of action; *Hexter v. Clifford*, 5 Colo. 173; *Chivington v. Colorado Springs Co.*, 9 Colo. 600.

The decree of the court below is reversed and the cause remanded.

Reversed.

1. A prospector locating for his principal is estopped to set up an alleged prior location in himself: *Fuller v. Harris*, 29 Fed. 814.

2. A prospecting contract is not within the Statute of Frauds and specific performance of the conveyance of the interest taken up for the ousted party will be decreed: *Moritz v. Lavelle*, 18 Pac. 803.

3. Effect of the prospector's notice to warn intruders: *Erhardt v. Boaro*, 15 M. R. 472; *Omar v. Soper*, Id. 497.

¹ARMSTRONG ET AL. V. LOWER.

(6 Colorado, 393. Supreme Court, 1882.)

The re location of an abandoned mining claim is made in substantially the same manner as the original location thereof. The re-locator must perform all the acts required in making a valid original location, in the same manner and within the same time as though the premises had always remained a part of the unappropriated public domain, except that he may adopt the boundary stakes of the abandoned claim, and instead of sinking a new discovery shaft, he may sink the old one ten feet deeper.

² **Discovery and discovery shaft distinguished.** If the re-locator finds a vein in the discovery shaft of the abandoned claim, he may, under our statute, make a valid re-location thereon, though technically such finding may not constitute a discovery.

Only the unoccupied and unappropriated mineral lands of the general government are subject to exploration and location.

Locator's right exclusive. When the locator has fully complied with the law in locating a mining claim, he is entitled to the exclusive possession and enjoyment thereof until it is forfeited or abandoned.

³ **Discovery shaft must be on public domain.** The locator of a mining claim must sink a discovery shaft upon territory which he has a right to appropriate. He can not sink such shaft upon ground embraced within a prior valid and subsisting location.

Location by trespass on third parties. Section 256 of the Code, does not prevent the admission of proof showing a failure to perform one of those acts essential to a valid location, though such proof also establishes the fact that actionable injuries were done to third parties who are neither parties nor privies to the action.

Location on the strike. The vein is the principal thing, and the location should be made in conformity with the strike thereof.

Presumption that location covers vein. When one has discovered a lode upon the unappropriated public domain, and has, within the proper time, in good faith, performed all the subsequent acts essential to a valid location as provided by law, he is entitled to the presumption that his lode extends through the full length of the claim.

Idem. And where another by a subsequent and conflicting location, undertakes to hold a portion of the prior claim on the ground that the lode thereof does not extend to the conflicting area, the burden of proving such fact is upon the subsequent locator.

¹ S. C., denying rehearing, 15 M. R. 458.

² *Wermer v. McNulty* 14 Pac. 649.

³ *Guillim v. Donnellan*, 15 M. R. 482.

Side veins. The object of location statutes is not merely to fix the amount of surface territory allowed the locator for working purposes, but also to protect him in the exclusive possession and enjoyment of his lode, and all other veins, lodes, or ledges the apexes of which are within his surface boundaries.

Appeal from District Court of Custer County.

The facts are stated in the opinion.

MONTGOMERY & RISING and JOHN W. WARNER, for appellants.

HUGH BUTLER and PLATT ROGERS, for appellees.

HELM, J.

This is an action brought in pursuance of an adverse claim filed in the United States land office, to determine the right of possession to the premises in conflict. It was tried in the court below prior to the passage of the act of Congress approved March 3, 1881, and therefore the changes introduced by that act, in the proof required, have no application to this case.

Appellees' rights were acquired by virtue of an alleged re-location of an abandoned claim. Both the abandoned and re-located claims are known as the "Swallow Tail" lode or location, and are identical in territory. Appellants, who were defendants below, base their right to the conflicting premises upon a location of the Silver King lode. Their alleged location was made subsequent to the location of appellees aforesaid. Appellees recovered a verdict and judgment in the court below.

There is not evidence sufficient to support such recovery on the ground of naked possession alone, and the same must be sustained, if at all, upon the proof of a valid re-location of the Swallow Tail lode by a full compliance with all the requirements of law.

The re-location of an abandoned mining claim is made in substantially the same manner as the original location thereof.

¹ *Pardee v. Murray*, 15 M. R. 515.

The re-locator may, under our statute,¹ (Sec. 1825, General Laws of Colorado,) adopt a part or all of the boundary stakes, if standing, erected by his predecessor, and he may sink the original discovery shaft ten feet deeper, instead of sinking a new one upon the vein; with these exceptions, he must perform all the acts required in making a valid original location, in the same manner and within the same time as though the premises had always remained a part of the unappropriated public domain. The essential prerequisite to the various acts constituting a valid mining location is the discovery of a vein, lode or ledge of mineral-bearing rock in place. But if the re-locator finds such vein in the discovery shaft of the abandoned claim, he may, under our statute, make a valid re-location thereon; though such finding is not a disclosure of something that "existed before but remained unknown," and therefore technically, perhaps, does not constitute a discovery.

Appellees, in making their re-location of the Swallow Tail lode, availed themselves of the privilege accorded by our statute (Sec. 1817, General Laws), and excavated a tunnel instead of sinking a discovery shaft.

The evidence and pleadings in the case establish beyond question the facts that said discovery tunnel, while within the surface boundaries of the Swallow Tail lode, was also upon the territory of a prior location, known as the Verde claim, with which the said re-location conflicted, and that the said Verde claim, at the date of such attempted re-location, and at the time of trial, was a valid and subsisting mining location.

Only the unoccupied and unappropriated mineral lands of the general government are subject to exploration and location. When one has discovered a vein and has complied fully with the law in locating a claim thereon, the territory inclosed within his surface boundaries is segregated from the public domain in so far as all parties, except the government, are concerned. The locator is entitled to the exclusive possession and enjoyment thereof until it is forfeited or abandoned; the prospector can not go within such surface boundaries to prospect for mineral veins, and his act, if he do so, is as much a trespass as though the ground were patented. To perfect a valid location the prospector must discover a vein or lode upon

¹ § 2409 of last revision.

the *unoccupied* and *unappropriated* public domain; he must then perform certain acts, among which is the sinking of his discovery shaft within the limits of the territory which he has a right to appropriate. He can not be allowed to sink such shaft upon ground embraced within a prior, valid and subsisting location. This link is as important as any other in the chain of acts required by law to perfect his location. If he may do this work upon another claim, we perceive no good reason why he should not be permitted to make his discovery of mineral, and post his discovery notice also, upon such previously appropriated territory. The fact that the owner of the prior location, if such be the fact, makes no objection, is not material, *provided* he has done nothing which in law will amount to an abandonment of the ground on which the subsequent discovery shaft is situated. He may, at any time, bring his action of trespass or ejectment, or upon proper showing he may obtain an injunction to prevent repetitions of the trespass; and whether he invoke relief in the courts or not, he may apply for and obtain his patent to the surface ground of his location, and include therein the discovery shaft and other evidences of location upon such surface ground made by the subsequent locator.

The law requires that the record of a mining claim shall contain such a description as will identify the same: R. S. of U. S., Sec. 2324.

The location certificate must state the number of feet claimed in length on each side of the center of the discovery shaft: General Laws of Colorado, Sec. 1813.

And any certificate which does not contain such factor in the description is void: General Laws of Colorado, Sec. 1814. To say, in the face of these statutory provisions, that the discovery shaft may be upon the territory of a prior, valid and subsisting location, would be to sanction the introduction of doubt and uncertainty into the description. For said shaft is the point of beginning this branch of the description, and to a portion of the territory claimed in each direction therefrom the locator would have no right whatever; and he could never, by virtue of his location alone and subsequent compliance with law, obtain title thereto.

A location can not be considered valid, unless, upon proper

development thereof, a patent may be obtained for such portions of the surface ground included therein as embraced the evidences of the essential acts of location, with the exception, possibly, of one or more of the boundary stakes. If a patent can be obtained for a mining claim, the discovery shaft of which is upon ground already located or patented, it ought, in reason, to follow that the \$500 worth of development work required might also be upon such previously located or patented ground.

The intent of the law to require this development work to be upon the premises sought to be patented is no clearer than is the intent of the statute to require the sinking of the discovery shaft upon territory *subject to location*. Any other construction would be a violation of the spirit of both statutes, and would lead to the ratification of frauds on the government.

But it is urged that appellants, having no interest in the Verde claim, can not be heard to complain.

They have a right to avail themselves of any defect in the location of appellees. It would not be contended that they might not show that appellees never sunk a discovery shaft at all, had such been the fact. But, if our conclusions above be correct, appellees are in no better position than that if they had, in fact, never excavated their discovery tunnel.

Counsel asks if benefit shall accrue to appellants, to the injury of appellees, because the Verde owners permitted appellees to do this work upon the Verde claim.

We answer that there is no evidence of abandonment of the ground on which the work was done, and the assumed *laches* of the Verde owners in asserting their rights in no way affects the question. Such work was done in constructing what was intended to be a discovery tunnel, and, as we have tried to show, there was a fatal defect in making a valid location, of which defect appellants might take advantage. But if it had been development work succeeding a proper location, we would answer the question negatively, because only the Verde owners could complain of the trespass.

Section 256 of the code upon which appellees rely in their brief and argument does not militate against the foregoing conclusion; its provisions, that the parties "shall be confined in their evidence to their respective rights and claims, and

the rights and claims of their grantors and privies in interest," and that "the action shall not be affected by any rights and claims of third persons, not in privity with either party," are aimed at the rule in actions of ejectment allowing defendant to defeat plaintiff's recovery by proving an outstanding title, or better right of possession in some third party. The object in actions contemplated by that statute, and in the case at bar, is to determine whether plaintiff or defendant has the better right to the possession of the premises in controversy, and the parties should be confined to evidence of their respective rights, regardless of the interests of third persons. But such right of possession in this case rests upon the perfecting of a valid re-location, and it is no violation of section 256 aforesaid to allow proof of the failure to perform one of the acts essential to such re-location, even though the evidence also establishes the fact that actionable injuries were inflicted upon the property of persons who were neither parties to the action nor privies in interest with such parties.

No testimony was offered to show that the vein of the Verde location extended from the point of the discovery thereof to that part of the Verde claim whereon was run the Swallow Tail re-location tunnel, and counsel for appellees argue that the presumption exists that the vein does *not* extend thereto, and therefore that such ground was a part of the unappropriated public domain subject to location.

The vein is, of course, the principal thing, and the location should be made in conformity with the strike thereof. "If the lode located terminates at any point within the location, or departs at any point from the side lines, the location beyond such point is defeasible, if not void." *Patterson v. Hitchcock*, 3 Col. 533.

But we can not agree with the learned counsel for appellees as to the presumption existing, proof of such termination of the lode or departure thereof from the said lines, being absent. When one has discovered a lode upon the unappropriated public domain, and has, within the proper time, in good faith, performed all of the subsequent acts essential to a valid location, as provided by law, he is entitled to the presumption that his lode extends throughout the full length of the claim. This is substantially the doctrine announced in *Patterson v. Hitchcock*, *supra*.

We are aware that there is excellent reason and weighty authority for the contrary position of counsel, but we believe that our conclusion is supported by profounder considerations of justice. The object of location statutes is not merely to fix the amount of surface territory allowed the locator for working purposes; such statutes are also intended to protect him in the exclusive possession and enjoyment of his lode and all other veins, lodes or ledges, the tops or apexes of which are within his surface boundaries. See R. S. of U. S., Sec. 2322. If A, B or C may subsequently locate a claim in conflict with his, and throw upon him in resulting litigation the burden of proving that his lode extends into the conflicting territory, the location statutes would, in many instances, benefit him but little. If the top or apex of his lode be fifty or sixty feet below the surface he would be compelled, in order to protect himself, to run drifts the entire one thousand five hundred feet, or sink a vast number of shafts from the surface down to the lode. This would cost him thousands of dollars and unless possessed of a fortune, he would be at the mercy, as to a large portion of his claim, of every unscrupulous adventurer who might conclude to profit by his discovery and his toil.

We think that if A has discovered a lode, and performed all the acts required in locating a fifteen hundred foot claim thereon, and B, by a subsequent and conflicting location, undertakes to hold a portion of A's claim, on the ground that A's lode does not extend to such conflicting premises, the burden of proving that fact by a fair preponderance of evidence should rest upon B. B attempts to build up a right in himself by reason of A's mistake in fixing accurately the direction of the strike of his previously discovered lode. This is not exactly analogous to the case where one rests his title or right upon the forfeiture of another, but justice demands the application of the same rule of evidence. The law contemplates that A shall locate his claim along the course of his vein, and if he fails to do so, he pays the penalty by the loss of his surface ground, and also his lode beyond the point of departure thereof from his side lines. But we can not conclude that these facts cast upon him, when his right of possession is assailed, the burden of proving, in the first instance, the negative propositions, that his lode does not depart from his

side lines, and that it does not terminate at some point short of the entire fifteen hundred feet between his end lines.

It is unnecessary for us to consider the objections presented to the unsupported hearsay evidence of the witness Lower, or to dwell upon the other assignments of error not covered by the foregoing discussion.

We have said nothing concerning the "Big Josie" claim, because it in no way affects the issues tried. That location is described in the pleadings, but it does not figure materially either in the evidence or in the briefs and arguments of counsel. The judgment will be reversed and the cause remanded.

Reversed.

¹ALEXANDER ET AL. V. SHERMAN ET AL.

(16 Pacific, 45. Supreme Court of Arizona, 1887.)

¹Re-location by collusion after mortgage. The owners of a mining claim who have mortgaged the same, may not abandon the same so as to permit the lands to be located as unoccupied mineral lands and defeat the mortgage lien thereby.

(*Syllabus by the court.*)

Appeal from District Court of Maricopa County; PORTER, Judge.

Action by J. L. B. Alexander and Bernard Goldman against Thomas Sherman and others to quiet title to a possessory mining claim. Judgment below for plaintiffs, and defendants appeal.

E. J. EDWARDS, for appellants.

GOODRICH, STREET, SMITH, GOODRICH and H. N. ALEXANDER, for respondents.

BARNES, J.

¹Clear as the equity of this case seems, the contrary is practically decided in a Montana case: *Saunders v. Mackey*, 6 Pac. 361.

²*Depuy v. Williams*, 5 M. R. 251.

This action was brought to quiet title to an unpatented mining claim located by Joseph Cox and John Demarbaix on the 31st day of January, 1881. On the 17th day of March, 1884, Demarbaix mortgaged his interest in the mine to Myrtle Godchaux for \$4,500, payable six months after date. The mortgage was an ordinary quit claim deed in form, with a defeasance. The mortgage was foreclosed and on the 30th day of December, 1884, Lindley H. Orme, the sheriff of Maricopa county, sold the property under a decree of foreclosure and order of sale to Myrtle Godchaux for the sum of \$250, and delivered to him a certificate of sale. The certificate of sale was assigned to the plaintiffs, and on the 6th day of August, 1885, N. M. Broadway, then sheriff of Maricopa county, successor to said Orme, executed and delivered to the respondents a deed to the property. The plaintiffs claim title through the foreclosure of the Godchaux mortgage.

The appellants contend that the mine had been abandoned by Cox and Demarbaix, and rely upon a subsequent location thereof. It was conceded that over \$100 worth of work was done on the mine by the locators for the years 1881, 1882, 1883 and 1884, and by plaintiffs for the years 1885 and 1886. Plaintiffs derived title from a mortgage by locators, foreclosed before the end of 1884. The annual work, called assessment work, made the title good as against the government. On the 18th of May, 1885, the ground was located by defendants as public and unoccupied mineral lands open to location. It is clear that this location was procured by the mortgagors in order to defeat the mortgagees, and was a fraud upon the mortgagees. Any attempt by them to abandon the mine was void. All their rights had passed to the mortgagees, and they could not abandon, and by so doing defeat, the mortgage. To permit such a subterfuge to defeat a mortgage would be to give to fraud the sanction of a court of equity: *Keller v. Berry*, 62 Cal. 488; *Stephens v. Mansfield*, 11 Cal. 363; *Richardson v. McNulty*, 24 Cal. 339; *Morenhaut v. Wilson*, 52 Cal. 263; *Derry v. Ross*, 5 Colo. 295. For the purposes of collecting taxes, mining claims have been listed and sold both as personal property (*Forbes v. Gracey*, 94 U. S. 762; *Waller v. Hughes*, 11 Pac. 122) and as real estate. "They are property in the fullest sense of the word."

"This claim may be sold, transferred, mortgaged and inherited." *Forbes v. Gracey*. If mortgaged, the rights of mortgagees shall be protected against any attempt of mortgagors to defeat them by abandonment, and, in a proper case, courts of equity can and should protect these liens as fully as securities upon any other species of property.

Other questions raised need not be discussed, as this determines the rights of plaintiffs and defeats the rights of defendants.

The judgment is affirmed.

WRIGHT, C. J., and PORTER, J., concur.

1. A re-located title relates back to the original location: *Fuller v. Harris*, 29 Fed. 814.

2. A re-location may be made without statutory permission: *Thompson v. Spray*, 72 Cal. 528.

3. An amended location certificate held to relate back, and made upon the facts to operate to cut out an intervening perfected location and record: *Craig v. Thompson*, 10 Colo. 517.

4. Resulting trust in favor of old owners by parties re-locating claim under their instructions: *Hunt v. Patchin*, 35 Fed. 816.

IRON SILVER MINING COMPANY v. ELGIN MINING AND
SMELTING COMPANY ET AL.

(118 U. S. 196. Supreme Court, 1886.)

¹The locator owns only what his lines inclose although not chargeable with fault in making them. It is better for him to lose part of the lode than to make title dependent on the results of developments made after lines have been chosen.

Side lines must include apex—End lines must be parallel. Only those veins can be followed on the dip whose apexes are within the surface lines and within the area found by extending down vertical planes through end lines which must be parallel.

Error to the Circuit Court of the United States for the District of Colorado.

Action for possession of the Gilt Edge lode, Lake county, Colorado. The plaintiff below, the Elgin Company, held it by patent.

Defendants, the Iron Silver Company, had worked into the Gilt Edge lines, following the dip of the Stone lode, a patent senior to the Gilt Edge.

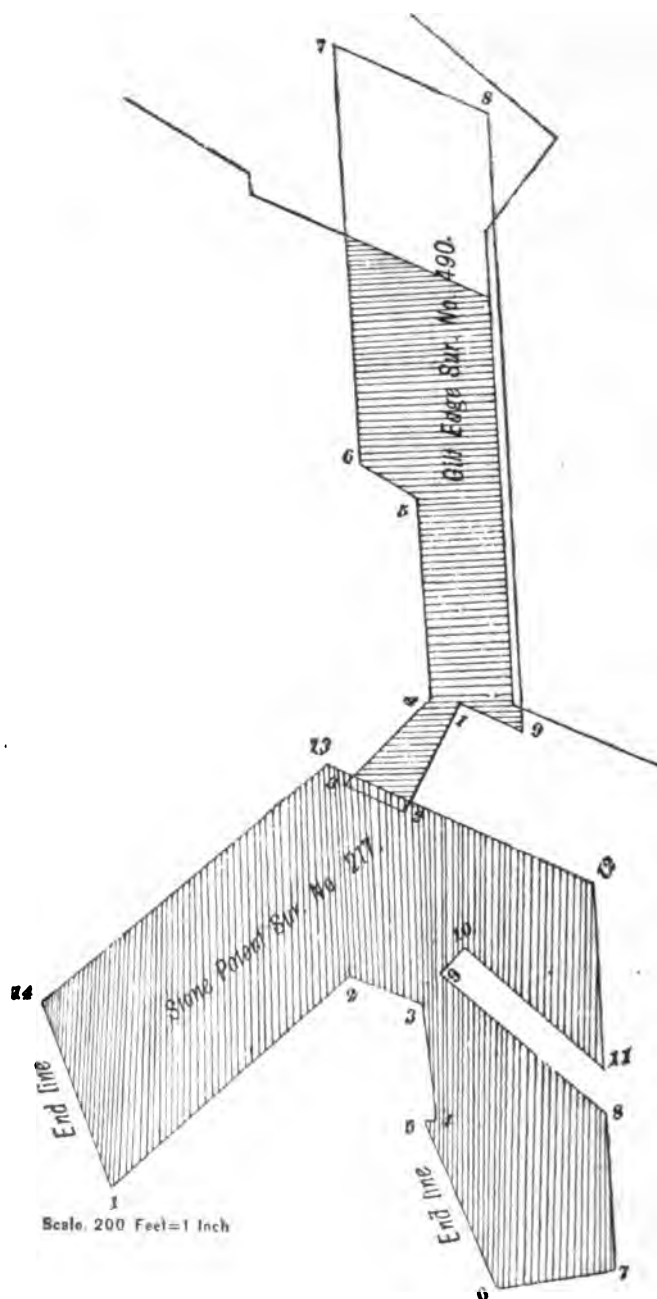
Trial to the court. The plaintiffs produced their patent to the Gilt Edge ground and defendants conceded that they were working under its lines, claiming the right so to do as afore stated. Defendants produced in evidence their patent to the Stone lode and offered to prove, under those clauses of the patent referring to the dip, that the patent lines inclosed a vein of rock in place and that its apex was found within its lines throughout their entire extent, which brought the lode at a dip of 15° from the horizontal into the Gilt Edge claim.

Plaintiffs objected to these offers on the ground that such facts, if proven, would establish no defense. That owing to the surface form or shape of the Stone claim it could not follow the dip beyond its own lines and because no part of the Gilt Edge claim or the lode within it came within vertical planes drawn downward along the end lines of the Stone claim continued definitely in their own direction.

The court sustained the objection and excluded the offers, to which ruling defendants excepted.

The following plan shows the surface form of the two claims, their relation to each other, the apex of the lode, and illustrates the entire controversy:

¹ *Golden Fleece Co. v. Cable Co.*, 1 M. R. 211.



No other evidence was offered. The court found the issue for the plaintiffs and judgment was entered in their favor, to review which the case was brought here.

WALTER H. SMITH and G. G. SYMES, for plaintiff in error.

T. M. PATTERSON, with whom was C. S. THOMAS on the brief, for defendants in error.

Mr. Justice FIELD, after stating the case as above reported, delivered the opinion of the court.

The question presented for our decision is one of great interest to miners on the public lands, and with respect to it much difference of opinion exists. This difference has arisen from a consideration, on the one hand, of what would properly be called the true end lines of a claim upon a lode of a specified length and width after it has been opened by explorations, and its general course and direction are seen; and a consideration, on the other hand, of the statute requiring the location of a claim to be distinctly marked on the ground, so that its boundaries may be readily traced. Such location often precedes any extended explorations, and is, therefore, made without accurate knowledge of the course and direction of the vein. When a vein has been discovered, the rules of miners and the legislative regulations of mining States and Territories generally allow some specified time for explorations before the location is definitely marked. But miners discovering a lode are sometimes in such haste to locate their claim and mark its extent and boundaries on the surface, that they omit to make sufficient explorations to guide them aright in measuring the ground and fixing its end lines. Hence efforts are not infrequently made to change those lines when the true course and direction of the vein are ascertained by subsequent developments.

The framers of the statute of 1872 evidently proceeded upon the theory that a claim on a lode following its outcroppings on the surface for the distance allowed, with a definite extension on each side of the middle of the vein, would generally take the form of a parallelogram. It provided that the length of a claim, subsequently located, whether by one or

more persons, should not exceed fifteen hundred feet; that its extension on each side of the middle of the vein at the surface should not exceed three hundred feet; and that its end lines should be parallel to each other: Rev. Stat. § 2320. A section of the lode within vertical planes drawn downward through the lines marked on the surface was designed as the grant to the original locator; but, as the vein in its downward course might deviate from a perpendicular and pass out of the side lines, the right was conferred to follow it outside of them, but within planes through the end lines drawn vertically downward, and continued in their own direction. The language of that statute, as carried into the revised statutes, is as follows:

“The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as, to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.” Rev. Stat. § 2322.

This section appears sufficiently clear on its face. There is no patent or latent ambiguity in it. The locators have the exclusive right of possession and enjoyment of “all the sur-

face included within the lines of their locations," and the location, by another section, must be distinctly marked on the ground so that its boundaries can be readily traced: Rev. Stat. § 2324. They have also the exclusive right of possession and enjoyment "of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations." The surface side lines extended downward vertically determine the extent of the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical planes drawn downward through the end lines. This means the end lines of the surface location, for all locations are measured on the surface.

The difficulty arising from the section grows out of its application to claims where the course of the vein is so variant from a straight line that the end lines of the surface location are not parallel, or, if so, are not at a right angle to the course of the vein. This difficulty must often occur where the lines of the surface location are made to control the direction of the vertical planes. The remedy must be found, until the statute is changed, in carefully making the location, and in postponing the marking of its boundaries until explorations can be made to ascertain, as near as possible, the course and direction of the vein. In Colorado, the statute allows for this purpose, sixty days after notice of the discovery of the lode. Then the location must be distinctly marked on the ground, and thirty days thereafter are given for the preparation of the proper certificate of location to be recorded: *Erhardt v. Boaro*, 113 U. S. 527, 533. Even then, with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein. But whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location, than that they should be subject to perpetual re-adjustment according to subterranean developments made by mine workings. Such re-adjustment at every discovery of a change in the course of the vein would create great uncertainty in titles to mining.

claims. The rule, whatever hardship it may work in particular cases, should be settled, and thus prevent, as far as practicable, such uncertainty.

If the first locator will not or can not make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences. He can only assert a lateral right to so much of his vein as lies between vertical planes drawn through those lines. Junior locators will not be prejudiced thereby though subsequent explorations may show that he erred in his location.

The provision of the statute, that the locator is entitled, throughout their entire depth, to all the veins, lodes or ledges, the top or apex of which lies inside of the surface lines of his location, tends strongly to show that the end lines marked on the ground must control. It often happens that the top or apex of more than one vein lies within such surface lines, and the veins may have different courses and dips, yet his right to follow them outside of the side lines of the location must be bounded by planes drawn vertically through the same end lines. The planes of the end lines can not be drawn at a right angle to the courses of all the veins if they are not identical.

It is also a fact of importance, that the land department has, since the act of 1872, followed the end lines as marked on the surface, and has limited the extra-lateral right of patentees by vertical planes drawn down through such end lines; as in the patent to Wood in this case. Any decision that the department erred in that respect, and that the rights of the patentees were different, would disturb titles derived from such patents, and lead to great confusion and litigation. If it is expedient to change the rule, legislative action should be invoked, as it would operate only in the future; and not judicial decision, which would affect past cases as well.

This view of the controlling effect of the end lines of the surface location is also sustained by the decision of this court in the Flagstaff case: *Mining Co. v. Tarbet*, 98 U. S. 463, 470. There the court said that "the most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings," and that "it is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or in-

clined," and that the end lines of the claim, properly so called, "are those which are crosswise of the general course of the vein *on the surface*." The court suggested that the law might be imperfect in this respect, and that, perhaps, the true course of the vein should correspond with its strike or the line of a level run through it; but it added that this "can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed."

Under the act of 1866, 14 Stat. 251, parallelism in the end lines of a surface location was not required; but, where a location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines. His lateral right, by the statute, is confined to such portion of the vein as lies between such planes drawn, through the end lines and extended in their own direction that is, between parallel vertical planes. It can embrace no other portion.

The exterior lines of the Stone claim form a curved figure somewhat in the shape of a horseshoe, and its end lines are not, and can not be made, parallel. What are marked on the plat as end lines are not such. The one between numbers 5 and 6 is a side line. The draughtsman or surveyor seems to have hit upon two parallel lines of his nine-sided figure, and, apparently for no other reason than their parallelism, called them end lines.

We are therefore of opinion that the objection that by reason of the surface form of the Stone claim the defendant could not follow the lode existing therein in its downward course beyond the lines of the claim, was well taken to the offered proof. Besides, if the lines marked as end lines on the plat of that claim can be regarded as such lines of the location, no part of the Gilt Edge claim falls within vertical planes drawn down through those lines continued in their own direction. In either view of the location of the Stone claim, the rejected proof would have established no defense. The premises in controversy are admitted to be under the surface lines of the Gilt Edge claim eastward from the defendant's claim, and the plaintiffs were, therefore, entitled to recover them.

Judgment affirmed.

Mr. Chief Justice WAITE, with whom concurred Mr. Justice BRADLEY, dissenting.

I can not agree to this judgment. In my opinion the end lines of a mining location are to be projected parallel to each other, and crosswise of the general course of the vein within the surface limits of the location, and whenever the top or apex of the vein is found within the surface lines extended vertically downward, the vein may be followed outside of the vertical side lines. The end lines are not necessarily those which are marked on the map as such, but they may be projected at the extreme points where the apex leaves the location as marked on the surface.

Mr. Justice GRAY did not hear the argument nor take any part in the decision of this case.

A tunnel 600 feet in length struck an ore body some 100 feet below the surface within the side lines extended perpendicularly downward on the Silver Terra patent. There was an older patent located on the outcrop on the hillside where the ledge showed at surface: *Held*, that there was no apex such as to allow the location on the edge of the stratum to go beyond the side lines: *Duggan v. Davey*, 26 N. W. 887.

LEWIS V. JAMES.

(Law Reports, 32 Chancery Division, 326. Court of Appeal, 1886.)

Lessee in contention ordered to pay royalties into court. Plaintiffs sued for specific performance of an agreement for a lease of coal mines at a royalty of 10*d.* per ton. Defendant had gone into possession. He claimed allowance for expenditure and also that the royalty was at a lesser rate. He was also maintaining suit for damages against plaintiffs for fraudulently inducing him into the contract: *Held*, that defendant should pay into court at the rate he conceded to be due, and as his getting the coal had diminished the value of the property, he would not have the usual option of giving up possession instead of paying the money into court.

The plaintiffs were lessees of certain beds of coal, and on the first of May, 1878, an agreement, by letters of that date, was entered into, that the plaintiffs should grant an underlease at a royalty of 10*d.* per ton and a dead rent of £300 to the defendant, who was the occupier of adjacent mines. The defendant was let into possession, and, as he deposed, expended upward of £14,000 in making an underground passage from his own mine to one of the seams agreed to be demised by the plaintiffs. The defendant commenced raising coal in 1881, and in the half year ending December, 1881, more than 4,000 tons were raised, in 1882 more than 20,000 tons, and the operations were continued on about the same scale up to the present time.

The parties being unable to agree as to the terms of the underlease, the plaintiffs in January, 1884, commenced this action for specific performance.

The defendant by his statement of defense alleged that the agreement had been that the defendant should pay a royalty exceeding by 3*d.* per ton the royalty which the plaintiffs were to pay to their landlord, and that the plaintiffs represented that such royalty was 7*d.* per ton; that the plaintiffs concealed from the defendant the fact that at the time when the agreement was entered into the royalty of 10*d.* payable by the plaintiffs, under their lease, had been reduced.

The defendant by counter-claim relied on the above state-

ments and stated that he had expended £14,000 on the faith of the agreement, and claimed specific performance of the agreement in the letters of the 1st of May, 1878, subject to modification as to the amount of rent to 3*d.* per ton improved rent, or in the alternative, damages.

An action by the defendant against the plaintiffs for damages for inducing him to enter into the agreement by misrepresentation, was pending in the Queen's Bench Division in which the defendant alleged that at the time when the agreement was entered into the plaintiffs had no right or title to grant any lease to the defendant, for that the plaintiffs had obtained their lease upon terms which, as they well knew, their lessor, who was a tenant for life leasing under a power, had no authority to grant, and that the plaintiffs fraudulently concealed the facts from the defendant.

No payments having been made by the defendant to the plaintiffs, the plaintiffs moved that the defendant might be ordered to pay into court the amount payable for dead rent and royalty according to the terms of the letters. The plaintiffs calculated the amount at £5,623 8*s.* 9*d.* Vice Chancellor Bacon refused the application and the plaintiffs appealed

Sir H. JAMES, Q. C., MARTEN, Q. C., and PHIPSON BEALE, for the plaintiffs.

This is a case of a purchaser in possession before completion. The defendant is rapidly working the mines and selling the coal without paying anything. If he should become insolvent the plaintiffs will have lost the coal and got nothing for it.

(COTTON, L. J.—Would you be content with payment into court of royalty at the rate admitted by the defendant?)

Yes.

(They were then stopped by the court.)

HEMMING, Q. C., and MACCLYMONT, *contra*.

The plaintiffs have no power to grant us the lease which they have agreed to grant.

(BOWEN, L. J.—That can not be decided now and you can not be allowed to get the coal without any security that it will ever be paid for.)

Where a purchaser is let into possession before completion, the vendor may call upon him to pay the purchase money into court, or give up possession. If the plaintiffs had given the defendant that option he would have given up possession.

It is not the course of the court to make an order for payment into court without giving an option.

(FRY, L. J., referred to *Cutler v. Simons*, 2 Mer. 103, and *Pope v. Great Eastern Railway*, Law Rep. 3 Eq. 171, as cases where no option had been given, the purchaser having done things to alter the state of the property.)

The plaintiffs, we say, are unable to grant us a lease.

(BOWEN, L. J.—Under what authority can you be getting the coal except the agreement which you yourselves set up for payment of the reduced royalty?)

Under an authority given by the plaintiffs that we should enter for the benefit of both parties, and we did enter before we had discovered the fraud of the plaintiffs and their want of title to grant a lease. If we ceased working, the mine would be drowned. The case is not like those referred to, where the purchaser was committing acts in the nature of waste. The defendant was put into possession in order that he might work the mines.

COTTON, L. J.

This is a motion of a somewhat special character made under very special circumstances. An action is brought for specific performance of a contract for a lease of a mine by the plaintiffs to the defendant. The defendant delivered a counter-claim asking to have specific performance on a different footing, viz., to have a lease at a smaller amount of royalty than that which the plaintiffs claim. In the meantime the defendant is in possession and is working the mine. He alleges that he has expended upon the property more than the value of the coal raised, and that is probably true, for it does not require any evidence to show that when a mine is first opened there must be a very considerable expenditure which for some time will exceed the amount received for the coal raised. This working has been going on for some time. Besides the action for specific performance by the lessor and the counter-claim by the lessee there is an action in the Queen's Bench Division

by the lessee against the lessors for damages. Now come the plaintiffs, saying to the defendant: "You are working our coal, and therefore you ought to pay into court, until the questions between us are decided, the amount which, according to the agreement, you ought to pay for coal which has been raised." We think that this contention can not succeed to its full extent, for as there is a contest what the terms of the agreement, as regards the royalty, are, it would not, in our opinion, be right to require the defendant to pay into court what the plaintiffs allege to be the proper amount of royalty.

This is in some respects like a case where a purchaser, being in possession, is required to pay into court, if he remain in possession, the purchase money agreed upon, but it is well known that in such a case under ordinary circumstances an option is given to the purchaser to go out, and the order only is that if he continue in possession he must pay the price into court. But that is not necessarily the only order which the court can make in such a case. Special circumstances may vary it, and there are two cases to which Lord Justice Fry referred, *Cutler v. Simons*, 2 Mer. 103, and *Pope v. Great Eastern Railway* Law Rep. 3 Eq. 171, in which, where a purchaser in possession was doing acts which were diminishing the property or interfering with the value of the property, the court ordered the money to be paid into court without giving him an option of going out and leaving the property which he had interfered with. In *Pope v. Great Eastern Railway Company*, a railway company was in possession and had turned out weekly tenants, and some of the property had been pulled down. Under those circumstances the court decided that the company, having interfered with the property and rendered it less valuable than it was, so that the vendor would not have a sufficient security for the purchase money, should at once pay the price into court. In *Cutler v. Simons*, and the other cases there mentioned, which were before Lord Eldon about the same time, orders were made for payment of the purchase money into court where purchasers in possession had committed acts of ownership tending to alter the nature of the property. The principle of those cases is this: that although under ordinary circumstances a purchaser in possession has the option of going out, and is not ordered to pay the purchase money unless he

elects to stay in, yet, where he has done that which has interfered with the value of the property, the court does not give him the option. Here the defendant is in possession, and although he may have erected valuable machinery, he is taking away part of the very subject-matter of the contract, and he insists that he is in possession under an agreement of which he himself is asking for specific performance. He ought then, in my opinion, to pay into court, until the rights of the parties are decided, that royalty which he says he will have to pay when the contention between the parties is decided.

BOWEN, L. J.

I agree with what the Lord Justice has said. What justice requires is plain, and it seems to me we have the clearest power to do it.

I entirely agree with what the Lord Justice has said about the power of the court to make this kind of order in an action for specific performance, and I will not go again through matters with which he is so much more conversant than I. Treat the action as you like, it is admitted that in any view of the case there is a liquidated sum due in respect of coal taken. It may be, for anything I know, that the defendant may have a good cause of complaint against the plaintiffs in respect of misrepresentation or in respect of the damage and expenditure into which he has been led by the misconduct of the plaintiffs, but that would be in the nature of a counter-claim for a sum to be set off against what stands as a liquidated sum due in respect of coal taken. I think that is clear. The plaintiffs desire specific performance. They claim royalty at 10*d.* per ton for coal taken. The defendant does not deny that he made an agreement which he intended to be binding, in which the royalty was (subject to what may be said as to figures) a smaller sum, which I will call 9*d.* The defendant, indeed, complains that there has been misrepresentation on the part of the plaintiffs, and that the plaintiffs can not give him what they promised to do; but what is the residuum of fact which is beyond all dispute? Why, that the defendant is going on working this very coal and carrying it away. Now, either he has a right to do it, or he has

not a right to do it. If he has not a right to do it, he ought to account for the value of the coal, at all events to the extent of the royalty which he himself says he was to pay. If he has a right to do it, his only claim of a right to do it can be upon the footing of what he alleges to be the agreement, viz., that he should pay a royalty of 9d. In either view something ought to be paid for the coal, and that something is the sum fixed by the defendant himself. What, then, is the power of the court on facts which stand as I have described the facts here? The plaintiffs at any moment, on motion for judgment, could get an order for payment of the minor royalty on the coal taken, and although it would not be reasonable to make the defendant pay over that sum to the plaintiffs, because he says that he has a counter-claim in the nature of a claim for misrepresentation and for moneys spent on the mine, yet to secure that sum in court seems to me, under the circumstances, to be clearly within our jurisdiction. I think, therefore, from every point of view, we have power to make this order.

March 31. Order made fixing a sum specified between £3,000 and £4,000.

Representations, although false, yet relating to points not material: *Held*, not sufficient to defeat specific performance: *Wilson v. McLaughlin*, 18 Pac. 789.

LITTLE PITTSBURG CONSOLIDATED MINING CO. v.
LITTLE CHIEF CONSOLIDATED MINING CO.

(17 Pacific, 760; 11 Colorado, —. Supreme Court, 1888.)

¹ **Burden of proof, when cast on defendant.** Where ore has been taken by willful trespass from the plaintiff's ground, part before and part since the plaintiff became owner of the premises, the burden of proof is on the defendant to show how much was taken before the change of ownership; otherwise he will be held for the whole.

² **A principal is bound to know what his agent does** in the course of his employment, and the rule casting the burden of proof on defendant corporation to show what amount of the ore was taken before plaintiff purchased, will not be changed on account of the ore being taken by the superintendent without the knowledge of his company.

No favor to special pleading in trespass. Appellant, charged with entering upon appellee's mining property and converting ore, having denied such entry and conversion *in toto*, failed upon the trial to sustain this position, and then attempted to show that the entry was made before the appellee owned the mine: *Held*, there being evidence to show that the appellant had full knowledge of the trespass, that it could not demand a new trial on the ground that there was no issue formed by the pleading on the fact that the entry was made before the appellee owned the mine.

Finding in disregard of referee's conclusions. A court of general jurisdiction, in passing upon the findings of law and fact contained in a referee's report in a case of trespass, sustained exceptions to several conclusions of law therein contained, and also sustained a motion to enter such a judgment as the facts proven and the law warrant: *Held*, that there was nothing in these facts, or the language used, to show that the court disregarded the findings of fact by the referee, and proceeded on its own findings, thereby exceeding its jurisdiction.

Commissioners' decision. Appeal from District Court, Lake County.

MARKHAM, PATTERSON & THOMAS, for appellant.

CLINTON REED and SAMUEL P. ROSE, for appellee.

MACON, C.

The facts, as found by the referee and reported to the court in this case, which are material to this opinion, are these:

¹ *Lupton v. White*, 2 M. R. 430.

² *Trihay v. Brooklyn Co.*, 15 M. R. 535.

That the appellee, some time during the year 1880, entered into and upon the premises of appellant, and extracted therefrom and converted to appellee's use, ore amounting in value to something over \$19,000; and that some time during the latter part of 1879, and the early part of 1880, appellant entered into and upon the mining premises known as the "Little Chief Mining Claim," and extracted therefrom, and converted to its own use, ore of the value of over \$37,000. The referee also found as a fact that a portion of the trespass committed by appellant upon the premises aforesaid was done while the premises were the property of appellee's immediate grantor, and a part was committed after the acquisition of title to said premises by appellee; but how much was taken from the grantor of appellee, and how much from the latter, was not shown. Upon this state of the case the referee concluded, as matter of law, that appellee could recover nothing for the ore taken by appellant after the acquisition of title to the premises by the appellee, because of a failure of proof as to the exact extent of its loss. Upon the filing of the report, appellant moved for judgment thereon, and appellee filed exceptions as to the whole report, and moved for such judgment as the facts and the law of the case warranted. The court sustained the exceptions to the report as to the first, fourth, fifth, sixth and eighth conclusions of law, and entered judgment in favor of appellee in the sum of \$23,589.73. Exceptions were then filed by appellant to the finding of the referee to the effect that appellant had entered in and upon the mining premises known as the "Little Chief," and extracted therefrom ore to the value of \$37,125, which being overruled, appellant filed its motion for a new trial, which also being overruled, appellant appealed to this court.

One of the assignments of error relied on by appellant is that the court sustained the exceptions of appellee to the report of the referee *in toto*, and retried the case upon the evidence found in the report; thus disregarding the facts found by the referee, and putting itself in the place of the referee, usurping the province of a jury. This view is accepted by the majority of my associates, and upon that ground they hold that the judgment should be reversed. In this opinion I can not concur. The majority opinion rests upon the construction of the language of the motion of appellee for judgment, and upon

that of the court in the order for judgment. The language of the motion is "to enter such judgment in the cause as the facts proven and the law warrant." The language of the court is: "Now, this day comes the plaintiff herein, by Messrs. Thomas and Lyles, its attorneys, and comes the defendant herein, by Clinton Reed, Esq., its attorney; and the court, having had under advisement the exceptions of said defendant heretofore filed herein to the report of the referee in this cause, as well as its motion to vacate and set the same aside, and to hold the same for naught, and to enter such judgment in this case as the facts proven and the law warrants, and having duly considered the same, and being well advised in the premises, now sustains said exceptions as to the first, fourth, fifth, sixth and eighth conclusions of law as found by said referee, and also sustains said motion to enter such judgment in this cause as the facts proven and the law warrants." It is supposed that counsel for appellee misunderstood the practice in cases referred, and called upon the court to exercise jurisdiction to disregard the findings of fact by the referee, and to find such facts as, in its opinion, the referee should have found upon the whole evidence, and thereupon to render such judgment as the law of such facts warranted, and that the court fell into the same error, and usurped jurisdiction to that extent. It may be admitted that the language of the motion justifies this inference as to the counsel for appellee; but I can find no warrant for the opinion that the court mistook the law, and adopted the view of the counsel, and thereby exceeded its jurisdiction in the premises. In the first place, it is a familiar rule that courts of general jurisdiction are never presumed to have transcended their jurisdiction, and he who urges excess in this particular must show it. If the record plainly shows the fact, that is the end of the controversy as to that question; but, if the record entry is capable of a construction consistent with the presumption of jurisdiction, that construction will be adopted. In my opinion, it is impossible to find in the order any support for the position that the court accepted the supposed erroneous views of counsel for appellee, and disregarded the findings of fact by the referee, and proceeded on its own findings. The report of the referee is not set aside and held for naught as a whole; for only the first, fourth, fifth, sixth,

and eighth conclusions of law are set aside in terms. It seems impossible to say that that part of the report not expressly set aside was not left untouched by the court. The words "being well advised in the premises, now sustains said exceptions as to the first, fourth, fifth, sixth and eighth conclusions of law as found by said referee," in the connection in which they are found, are to my mind as conclusive that all of the other exceptions, both as to the law and the facts reported, were left undisturbed, as if the words "the other exceptions are overruled" had been added. A judgment is the conclusion of law in a particular case announced by the court; and, while the language used by courts in pronouncing judgments is in many instances identical, yet there is no legally prescribed verbal formula which must be used for that purpose. If, in the record entry of what purports to be the judgment, enough is found upon which it can be seen that the court intended to render judgment, it will not be set aside because it is not couched in artificial and technical phraseology. But I can find in this entry of judgment no fault with the language used by the court. The clause, "and also sustains said motion to enter such judgment in the cause as the facts proven and the law warrants," does not mean any acceptance of the supposed views of counsel as to the jurisdiction of the court to find the facts, but is simply used for the purpose of identifying the motion ruled upon. It is also supposed that the clause found in this entry, to wit, "and it appearing to the court from the facts contained in the referee's report aforesaid, that said defendant should have judgment against said plaintiff for the sum of \$23,589.73, it is now by the court considered," etc., goes to show the usurpation of jurisdiction by the court below; that, in using the term "facts contained in the referee's report," the court intended such facts as, in its opinion, the testimony given at the hearing before the referee established, and not such facts as found by the referee. There is nothing to show that the court did not use this expression as synonymous with the term "facts found," but a great deal to show that, in the mind of the court, the two forms of expression were one and the same in meaning; for it is undeniable that the court accepted every finding of fact reported by the referee, and upon them founded its judgment; the fact that

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each party had mined in the premises of the other, and converted large quantities of ore taken therefrom, the value of such ore so taken and converted, the date of the actual acquisition of the Little Chief premises by the appellee, the fact that a portion of the ore taken by appellant was taken before the acquisition of appellee's title to the premises, and, in short, all the facts on which the referee rested his conclusions of law. It certainly does not appear, in that clear and unequivocal way in which it should to support the view of the majority, that the court disregarded a single fact found by the referee; and in this state of the case the presumption that the court did not transcend its jurisdiction should be allowed its full force.

If, however, the court did set aside some of the facts found by the referee, if enough were left to authorize the judgment rendered, it should stand, unless there were error in applying the law to such facts. It can not be denied that, so far as the facts found by the referee, and unquestionably accepted by the court, go, they are sufficient to justify the judgment, unless, as already said, the court erred in the application of the law thereto. It is true that, in the opinion by the court stating the grounds of its judgment, some dissent was expressed with the finding by the referee as a fact that the plaintiff was duly incorporated under the laws of New York, and, by a compliance with the laws of Colorado, authorized to do business in this State; but this dissent was rested upon the ground of such finding, and not upon the finding itself; for the court held the stipulation entered into between the parties before the referee, and reported by him, waived, or rather admitted such incorporation, and made it unnecessary to offer evidence to that point. But if it were conceded that the court below did review the entire case and find facts not found by the referee, upon which, as well as those found by the referee, its judgment was based, and that, without such supplemental facts thus found by the court, it would have given judgment for the appellant, the judgment should not then be reversed, if it appears that the facts reported by the referee were sufficient to have justified the judgment. Such action on the part of the court would be error without prejudice only. It is clear that there were sufficient facts reported by the referee, as found by him, to warrant the judgment, without any additional

facts, if the law is as I think it is. Then, did the court err in applying the law to the facts reported by the referee?

In the examination of that question, I shall express no opinion upon the ruling of the court below upon the doctrine of relation, and as to the effect of the stipulation of the parties made before the referee; because, if the court erred in its opinion as to these, and still held correctly as to the duty of appellant to make out the fact that a part of the ore taken by it from the Little Chief premises did not belong to appellee, and to show how much belonged to its grantor, such errors will not reverse the judgment. A correct conclusion is not overthrown because it is reached by illogical reasoning, or upon some grounds which are false. The ruling of the court on this point is supported by a principle which has very frequently been applied in adjudged cases, and after diligent search I have been unable to find one case in which it has not been applied in the same way as in this, upon facts of the same class and nature as those of this case. In the American note to the leading case of *Armory v. Delamirie*, 1 Smith, Lead. Cas. 589, the doctrine is broadly stated thus: "When the nature of a wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of the loss, the law will aid the remedy against the wrongdoer, and supply the deficiency of proof caused by his misconduct, by making every reasonable intendment against him, and in favor of the person whom he has injured. A man who wilfully places the property of another in a situation where it can not be recovered, or its true amount or value ascertained, by mixing it with his own, or in any other manner, will consequently be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole if his share can not be distinguished, or responding in damages for the highest value at which the property in question can reasonably be estimated;" citing *Lupton v. White*, 15 Ves. 432; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108; *Ryder v. Hathaway*, 21 Pick. 298; *Clark v. Miller*, 4 Wend. 628; *Bailey v. Shaw*, 4 Fost. (N. H.) 297; *Preston v. Leighton*, 6 Md. 88. Here the appellant clandestinely entered into the Little Chief mining claim, under circumstances and in a way which made it practically

impossible for the owner thereof to know that fact, and removed therefrom, and converted to its own use, property to the value of \$37,125. It is said that part—a large part—of this property was taken from the grantor of the appellee, and a part from the appellee (which, upon the facts of this case, must be admitted); and that, as appellee affirms such wrongful taking of its property, the burden of proof of that fact is on it to show exactly how much of the ore belonged to the appellee, and that, in the absence of such exact proof, the appellant is relieved from all responsibility. In *Suydam v. Jenkins*, Sedg. Lead. Cas. 566, Duer, J., speaking for the court, says: "Unless we are greatly mistaken, there are certain indisputable rules, or, more correctly, principles of natural justice, by the application of which the amount that the injured party ought to recover may in all cases be readily and certainly determined. Setting aside the exceptional cases in which exemplary damages may be justly claimed and given, and confining ourselves to those in which the remedy sought is simply pecuniary, the principles which, as it seems to us, are manifestly just and universal in their application are, that the owner to whom compensation is due must be fully indemnified, and that the wrongdoer must not be permitted to derive any benefit or advantage whatever from his wrongful act. * * * An indemnity must always be given to the injured party; but it is not in all cases the measure of damages which the wrongdoer ought to pay." If the doctrine announced in the authorities above referred to is law, then it is clear that this position of appellant has no foundation on which to stand. The practical result of the rule contended for in this case is that a wrongdoer, by so committing his wrongs upon property held by two or more persons successively in point of time that no one of such persons can show with certainty what he has suffered, is to be permitted to defeat a recovery by either, and to be exempted from all responsibility for his wrongs. Such a doctrine is equally shocking to legal as to moral justice, and I believe no case can be found which supports it.

The case of *Dean v. Thwaite*, 21 Beav. 621, is exactly in point, there being no fact in that case upon which it is possible to distinguish the principle to be applied from this.

There the plaintiff brought his suit for an accounting against defendant in the year 1855, alleging an injury upon his colliery by the defendant, and a continuous working therein, and the extraction of coal therefrom since 1840. One defense, among others, set up in that case, was that a large part of the coal taken by the defendant was subject to the bar of the Statute of Limitations; and, though the report of the case does not expressly show that defendant insisted that plaintiff must show with certainty how much coal was taken by defendant within the Statute of Limitations before he could recover for anything, it is obvious, from an examination of the case, that such defense was made and contested by the plaintiff. But, whether this be true or not, the rule adopted by the court is so clear, and so entirely applicable to the facts of this case, that it may well be inserted here. After the first argument of the case, the master of rolls said: "The question of liability with respect to the working of minerals under ground, which can not be perceived in the same way as operations upon the surface, stands, in my opinion, in a very peculiar light; and it is very important to consider upon whom the burden of proof lies in a case of this description. In my opinion, the burden of proof lies upon the wrongdoer to show that the coal has not been taken from the plaintiff's property within the time during which this court would make him accountable for it. It was impossible for the plaintiff to ascertain that fact; it was solely within the knowledge of the defendants and their workmen. I think that the plaintiff has made out his right for an account of the coal which has been taken from his ground, subject to the question of the Statute of Limitations, upon which I should wish to hear a reply." It appears that argument was heard upon that question, and the master of rolls then used the following language: "I will state my opinion to-morrow. If I should be of opinion that the account should be limited to six years before the filing of the bill, which is my present impression, the course I should probably take is this: I should direct some competent person to ascertain the amount of coal which has been taken from the plaintiff's land, and then require the defendant to show what part has not been taken within the last six years." On the next day the court delivered the final opinion thus: "I retain the opinion

which I expressed yesterday, that an account ought to be directed, but that it must be confined to the coal gotten within six years before the filing of the bill. * * * There are, besides, some indications on the evidence, which weigh with me on this question, that the plaintiff was put upon inquiry, and that various circumstances existed which might have led him to take proceedings at an earlier period than he actually did, for the purpose of ascertaining the state of the works below the surface of the earth, and whether they trenched on his property. I am of opinion, therefore, that in this case the account must be confined to six years before the filing of the bill. The way I intend to deal with the account is this: I shall see if the parties themselves can agree as to the amount and extent of those workings. If they can not, then I shall probably appoint, under the powers intrusted to me by the act of Parliament (which I think extends to cases of this description), some coal agent who is perfectly well acquainted with matters of this description, to examine and make a report as to the state of the works, and as to what coal has been taken from under certain plats of land of the plaintiff, which will be specified, and to take all proper measurements for that purpose. Suppose he finds that a certain quantity, say, 1,000 tons, has been taken. I shall then call on the defendant to show what portion of that coal has been taken prior to the six years. I think the burden of proof ought to rest on the defendant, for this reason: I assimilate this to the case, which I have frequently had occasion to refer to, of the chimney sweep who found the diamond ring, (*Armory v. Delamirie*), and governed by the principle, which I have constantly acted upon, that the case will be taken most strongly against a person who keeps back and destroys evidence. I apply that principle to a person whose duty it was to keep strict evidence of what workings there were in other persons' lands, and shall charge a person working the coal mines on the adjoining land with the full amount raised, unless he can prove it was not taken within the time during which the court directs the account. On taking that account, I shall certainly not treat this as a case of fraud, but shall act on any reasonable evidence I can get to ascertain at what time the coal was worked. This is the view I take with respect to the mode of taking the account of the coal worked."

This case calls more loudly for the application of the doctrine that the wrongdoer must suffer from the confusion he has created, or the want of evidence which he has made it impossible for his victim to produce, than did the case just quoted; because, in the latter case, there were some facts indicating that plaintiff had noticed of the trespass complained of, and might have made such examination as to have discovered the extent of the wrong, and brought his suit earlier, but here there is no pretense even that appellee or its grantor had the remotest suspicion of the trespass of appellant. The fallacy of the opinion of the majority is in confounding the distinction between the burden of proof and the weight of evidence. The former is a rule of law; the latter of fact. The one belongs to the court; the other to the jury. Whether the burden of proof as to a certain fact is on the plaintiff or defendant, the court will determine upon the settled rules of judicial evidence, one of which is that the burden of maintaining any issue of fact rests upon him who, from the nature and character of the fact, has, or might have, peculiar information thereon. It is thought that the ruling of the court on this point rested on the fact that appellant withheld evidence it might have produced; and that, as it was not shown by appellee that appellant had knowledge as to how much ore it took from the grantor of appellee, the ruling was erroneous, and the judgment ought not to stand. This is a mistaken view, arising from a failure to discriminate between the case where one party actually has evidence he will not produce, and that where, from the nature of the fact in question, one party might and ought to know of the circumstances, and the other can not be supposed to have any definite knowledge thereof. Here the law presumes that the appellee can not know how much ore appellant had extracted from the Little Chief mining premises before the former acquired the title thereto, because the trespass was committed under ground, in the dark, and secretly; while the law does presume that appellant does know that fact, because it might and it is its duty to know it. It is upon the consideration of the relative situation of the parties, disclosed by the character and nature of the transaction, that the rule is adopted; and it is not set aside because the wrongdoer in any particular case may show that he does not, in fact, know more

of the matter than the sufferer. The same doctrine was enforced in *Mortimer v. Cradock*, 12 Law J. C. P. 166, cited in 1 Add. Torts, 561, the facts of which were that a diamond necklace of the value of £500 had been stolen, and a portion of the stones were soon afterward found in defendant's possession. A verdict against him for the value of the whole article was sustained. The whole doctrine grows out of the maxim that no man shall take advantage of his own wrong, and is administered in various ways. A familiar example is found in the confusion of goods; and in cases of tort where one tort-feasor is made to bear the burden of the whole loss, though, in fact, he may have received none of the fruits of the wrong.

My associates seem also to think that the fact that the appellant, the Little Pittsburg Consolidated Mining Company, as a company, did not know of or sanction this wrong committed by its superintendent, has such force and bearing in the case as to relieve it from the necessity imposed upon it by the court. Such fact was not found by the referee, and does not appear in the record; but if it did, it would not affect the question. A principal is bound to know what his agent does in the course of his employment, and particularly so when the profits of the conduct of such agent go in the pockets of the principal. In *Dean v. Thwaite*, *supra*, the defendant denied, under oath, her knowledge that she was trespassing upon the property of the plaintiff, and the court accepted her statement as true, and said, "I shall certainly not treat this as a case of fraud;" and yet enforced the rule against the defendant.

It is thought that the willfulness of the wrong committed by Bearce, appellant's superintendent, and the ignorance of the appellant of the fact until after its consummation, relieves it from the rule of evidence insisted on above; and the doctrine upon which this view is based is that, where the act of the agent is one done by him outside of the scope of his employment, for his own gratification or profit, the principal can not be held liable for the consequences of such act. As a general proposition this may be conceded. In support of this position, many cases are cited; but, as I view the law, they are inapplicable to the question under discussion. They establish the exemption of the principal from all liability to the injured party where the agent is found to have acted outside of his

authority, express or implied. But here it is conceded that appellant is liable to appellee for so much of the ore as the latter may be able to show itself entitled to. The cases cited in the majority opinion hold that the principal is liable upon the ground that the servant did the wrong complained of within the scope of his employment; or that the master is not liable because the servant acted beyond the scope of his employment. All the cases and text-books cited on this subject go upon the ground that the act which is the cause of action results in no pecuniary profit to the principal; but no case can be found which holds that where the agent, upon his own motion, illegally takes the property of one, and gives it to his principal, the principal is not liable for such property or its value. If, then, the appellant is liable to appellee for the act of its superintendent in the premises, does the mere fact of its receiving and converting the ore, or its value, in ignorance of the true ownership thereof, change the rule of evidence on the facts of this case? I think not, for the following reasons:

First. The fact is found by the referee that appellant took and converted this ore; and that finding this court is bound to accept, because appellant accepted such finding in moving for judgment on the report, and because the evidence before the referee supports the finding.

Second. The superintendent, Bearce, in mining and milling the ore, acted for the appellant, and within the scope of his employment. He did not act for himself, nor for a stranger, and it is impossible that one should act for no one. Nor does it appear that he committed the wrong from any spirit of actual malice or hostility toward appellee or its grantor, but solely in the interest of appellant. In all that was done by him, he used the means, machinery, appliances, and workmen of appellant. Everything was done in its name. His salary, if he was paid for his services, was paid by the appellant, and the entire profits of his operations went into the coffers of his employer. The scope of an agent's employment is said in *Kingsley v. Fitts*, 51 Vt. 416, "to be determined, not alone from what the principal may have told the agent to do, but from what he knows, or, in the exercise of ordinary care and prudence, ought to know, the agent is doing in the transaction."

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Third. Bearce was appellant's mining superintendent, and was clothed with the general management and control of its mining operations, with power to direct when and how the workmen in the mine should work; or he was, in this department, subject to the orders and directions of appellant. If he occupied the first position, then, as to those under his control and as to strangers, he was the principal, and his acts were its acts, and his wrongs its wrongs. He was the representative of the company, as much so as would have been the president and all the other directors of the company had they exercised the same powers as the superintendent. In *Malone v. Hathaway*, 64 N. Y. 5, in discussing the doctrine of responsibility of employers, whether corporations or natural persons, for the acts and omissions of their superintendents, Allen, J., says: "Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employes, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and within the limits of the delegated authority—the acting principal. These acts are in such case the acts of the corporation * * * and the corporation, within adjudged cases, must respond as well to the other servants of the company as to strangers. They are treated as the general agents of the corporation in the several departments committed to their care. A person thus placed by a corporation in such a position of trust and authority may be fairly considered as its representative *pro hac vice*." In *Corcoran v. Holbrook*, 59 N. Y. 517, the rule is thus expressed: "It is evident that this general agent was not a mere fellow-servant of the plaintiff, who was a common hand in the mill, but that he was charged with the performance of the duties which the defendants owed to the hands employed in the mill. There was no other person to discharge those duties, and defendants could not, by absenting themselves from the mill, and refraining from giving any personal attention to its conduct, but committing the entire charge of it to an agent, exon-

erate themselves from those duties, or from the consequences of a failure to perform them. * * * As to acts which a master or principal is bound, as such, to perform toward his employes, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present and liable for the manner in which they are performed." These cases were brought by servants to recover of their employers for injuries caused by the negligence of superintendents; and the question decided was that of the right of such employes to recover for the negligence of the vice-principal; but the legal consequences of such authority in the agent are as applicable to cases where strangers are injured by such agent as in those of servants. The liability of the principal arises out of the representative character of the servant, whose act or omission has caused damage. Occupying such a position, and vested with such authority, he is bound to do or prevent the doing of all acts which will protect in the one case, or injure in the other, both the employes of his principal and strangers. If he violates his duty to his principal, and is guilty of a wrong to a stranger, whereby the employer is directly and pecuniarily benefited, such wrong is in point of law the wrong of the latter, and he stands in the same legal situation as the agent would occupy were he sued for the injury. It can not be denied that it was the duty of appellant, in mining its own territory, to respect that of its neighbors, and restrain its workmen and servants from trespassing upon such neighbors. Having delegated the entire control of its mine and miners to a superintendent, withdrawing from all control and supervision itself, it can not be heard to say that it was not present when the wrongs complained of were committed, and knew not of their commission. But if Bearce was not vested with this general authority, and was under the control and direction of appellant, through its board of directors or other agent, then the company is certainly bound to know what its servants were doing, and to control them.

Fourth. Because appellant can not be heard to say it did not know that its superintendent was trespassing upon the premises of another. To repeat: If Bearce had such authority in the premises as to make him appellant's superintendent,

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then, by the rule of law which holds him to be the principal as to third persons, the question of notice is excluded from the case; but if he was less than a representative, and was directed and controlled by his principal, the latter is estopped to say it did not know that which its agent knew. The law is thoroughly settled that, as between the principal and a stranger, the former does know whatever his agent knows, learned while acting for such principal in the particular transaction. Many cases, among which are *Hart v. Bank*, 38 Vt. 252; *Dresser v. Norwood*, 17 C. B. (N. S.) 466, and *The Distilled Spirits*, 11 Wall. 356, hold that notice possessed by an agent, even though it may have been acquired prior to his agency, or in another transaction, which he is at liberty to communicate to his principal, will bind the latter. But many of the courts of this country decline to carry the doctrine to this extent, and limit its application to cases where the knowledge or notice possessed by the agent was acquired during his particular agency, and in the course of the same transaction. In *Sooy v. State*, 41 N. J. Law, 400, the court, in its discussion of the doctrine of the cases just cited, says: "The more just principle would seem to be one that aimed to award to each the benefits and burdens which would have arisen if the business had been transacted by both in person. Such a result would follow if the rule to be adopted were that whenever the principal, if acting in the matter for himself, would have received the notice, the knowledge of his agent shall be chargeable to him." If we apply this rule to the facts of this case, it is at once manifest that, had the appellant done its own work in the mine, dispensing with agents and superintendents, it must have known when it crossed its boundary line, and entered the Little Chief territory. Here, also, the knowledge of the superintendent, with which the appellant is chargeable, was obtained in and by the very transaction constituting the cause of action.

Fifth. Because, if the appellant, by its whole body of directors, had worked in its mine, and ignorantly crossed into the Little Chief ground, and taken and appropriated the proceeds of this ore, it would be liable therefor to the owner thereof, and would be bound to show how much of it did not belong to appellee. The entry in such case would be wrong.

ful, though done unwittingly; and appellant, being a wrongdoer, would be subject to the rule cited above; that what is one's duty to know the law holds him to know. Neither in legal nor natural reason can there be any difference between taking the ore ignorantly and taking the value thereof without knowledge of the place from which the ore was taken; and if, in the first instance, the burden of proof would be upon appellant, it would in the last. Over the superintendent of appellant, appellee had no control; with him it had no connection; between them there was no privity, and no channel of communication; while he was the mere creature of appellant. It was his legal and moral duty to keep out of the premises of appellee. If he would not, but, for the direct and sole benefit of his employer, he would take the property of appellee, his duty to know how much he took is undeniable; and it is but simple justice and reason that his employer should exact of him the observance of this duty, and, failing so to do, be held to the same obligation. Appellant is as much bound to know where the money it received came from as it would have been to know from whose ground the ore producing the money came from, had it done the mining. For this position I rely upon the case of *Dean v. Thwaite*, 21 Beav., *supra*. It is thought by my associates that the judgment of the Master of Rolls in that case proceeded on the notion of withholding evidence; but this is clearly a mistaken view. There, the defendant, a woman, positively denied in her answer, under oath, any knowledge that her workmen and agents had entered the land of the plaintiff, and there was no proof to overthrow this denial. Her denial was accepted as true by the court, and the Master of Rolls said: "I shall certainly not treat this as a case of fraud." Still, her morally honest ignorance of the fact that her servants had been taking the coal of Dean, for her benefit, did not relieve her from the duty of showing just how much of the whole mass was taken during the time covered, and excluded from the account by the Statute of Limitations. If this ruling is good law, why should it not be applied to this case? It is true that the Master of Rolls said that he assimilated the cases to that of *Armory v. Delamirie*, which was a case in which the defendant kept back evidence; but the analogy between the two cases arose, not out

of the fact that Mrs. Thwaite actually had, as the jeweler had, the evidence which she could produce, but had, out of the legal duty resting upon her to know the boundaries of her own land, and to know when she crossed them; from which followed the legal duty, flowing from such legally imputed knowledge, to keep "strict evidence of what workings there were in other persons' lands." Certainly, our law requires every one to know the boundaries of his own land; and in an action *quare clausum fregit* against him for passing his boundaries, and entering the land of his neighbor, he could not defend by showing his ignorance of such boundary lines. And whether he, or his servant acting within his employment, committed the trespass, is immaterial. Hence, in this case, Bearce, being the principal, was bound to know, and in fact did know, when he left appellant's premises, and he, as much as appellant, was bound to keep the evidence of his trespass for the benefit of the suffering neighbor.

Sixth. The burden of proof is upon appellant, upon the plain and well-understood rules of evidence, outside of the question of wrongdoing. It is said that the burden of proof, of any fact is upon him who affirms it. This is true, in a general sense. It was certainly incumbent on appellee to show, to make good its claim against appellant, that the latter had unlawfully entered upon its mining premises, and removed therefrom ore. This it did. It showed that from January 2, 1880, it had been in possession of the Little Chief mining claim, under claim of ownership in fee, and that from January 10, 1880, it had the absolute fee-simple title to the property; further, that appellant had excavated in the said claim a certain area, and taken therefrom ore of the net value of \$37,125, and rested. To meet and avoid the force of this proof, appellant did what in pleading would be denominated "confessing and avoiding;" that is, it showed that, notwithstanding it took all of this ore, appellee was not the owner of all of it, but that a "large part" was the property of appellee's grantor. This was clearly an affirmative defense, which appellant was bound to make good, by showing, not only that some of the ore did not belong to appellee, but how much. To illustrate: Suppose appellant, instead of denying in his replication the taking of any ore from appellee, had admitted

it, setting up that a large part thereof was taken from the appellee's grantor, and that for such part it had procured from such grantor a release of damages, would appellant not have been called on to show accurately how much of the ore this release covered? In other words, would not such release have been an affirmative defense, and if so, is it any more so than the defense upon which appellant now relies?

The opinion that a new trial should be granted because the amount of ore taken from the grantor of appellee by appellant was not made an issue in the case by the pleadings, it seems to me, is quite novel, and inconsistent with the settled rules of practice. It is said that appellant, by its replication, denied the taking of any ore from the Little Chief premises, and produced considerable evidence to sustain this denial; and that, as the fact that appellant had mined in the Little Chief ground and converted ore therefrom, as well as that a part of the trespass was against appellee's grantor, was developed by the evidence before the referee, and as neither party has had an opportunity to get evidence upon this fact, both should be admitted to re-open the case so far as to produce what evidence they may upon the point. I fail to see what bearing the character or form of appellant's pleading has upon the question. By appellee's answer, appellant was charged with entering upon, and removing from the Little Chief mining claim a large quantity of valuable ore. Instead of confessing such trespass in part, and avoiding it so far as the ore belonging, at the time of its commission, to appellee's grantor went, appellant saw fit to deny *in toto* such entry and conversion, and sought to make this denial good: first, by showing it had not entered the Little Chief premises at all, and then, when that position became untenable, by showing that such entry was made before appellee owned the mine. The form of the pleading adopted by appellant certainly did not in the least affect or limit it in making its defense before the referee; for it made by its evidence the very same case it would have made, had it pleaded in confession and avoidance, as above suggested. Upon the form of the issue as to this fact, chosen by appellant, there can be no right to a new trial of that fact. If, however, it is supposed that the pleading shows that appellant had no notice of the wrongs charged in

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and by the answer in the case until the trial, when it was testified to by witnesses, and that it was taken by surprise, it is answered that such assumption has no basis in the theory of pleading, nor in the experience of practice. It is good pleading to deny wholly the wrong with which one is charged, putting the party alleging it to the proof, relying upon his inability to make any proof, or proof of the whole wrong; and it is the almost invariable practice to do so. But the fact that the complaining party does succeed in proving a part or all the wrongs alleged, is no evidence that the defendant is surprised in either fact or law. The answer in this case was sufficiently distinct as to dates and amounts, and in every other particular, to fully apprise appellant of the charge against it, and to enable it to prepare its defense. Nor, if we look away from the pleadings to the course of the trial before the referee, do we find any support for the notion that appellant was surprised, or was in any way unprepared to meet the trespass charged against it. The case was commenced in September, 1880, the answer was filed on the 1st day of March, 1881, and the report of the referee filed in July, 1883. Thus more than two years passed after appellant was, by the answer, plainly notified that it was charged with this wrong, before the report was filed. All of this time appellant had to inquire whether its agents or workmen had passed the boundaries of its premises, and entered those of appellee, or its grantor; and from the array of witnesses it marshaled at the trial and examined on this fact, it is evident that it was diligent. To say it could not discover at once, by a mere inspection of its mine on the side adjoining the Little Chief claim, the fact that it had entered and mined in the latter premises, is to ignore the evidence of the witnesses before the referee; and to assume it did not at once institute such inquiry, is to charge it with a degree of negligence that would deprive it of any right to a new trial. Besides, the witnesses examined by appellant upon this branch of the case were the men who did the very work of which appellee complains, or, at least, many of them were; and why it should be supposed that others can be found who will speak more definitely on this point it is difficult to understand. Further, the appellant never asked, during the progress of the examination before the referee, for

a continuance on account of absent witnesses, nor for a new trial on the ground of surprise or newly discovered evidence. In the elaborate argument of appellant's counsel, there is no hint or suggestion that a new trial for the purpose of making a better showing as to the ore taken from appellee's grantor was desired, or would be of any benefit to either party. But appellant is content to leave the fact in its present state of uncertainty, if this court will hold the law to be that appellee must show definitely how much of this wrong was perpetrated upon it, in order to a recovery of anything. Now that appellee's principal witness is dead, it would be unjust to send this case back for a re-trial; because, though his testimony may be used in such trial, it will not have the same effect as his oral testimony would have. In my opinion, the judgment in this case should be affirmed.

PER CURIAM.—The referee's report was divided into separate findings of fact and of law. The findings of fact were numbered from 1 to 6, inclusive. By reference to the original transcript we discover that, immediately following these findings, the referee uses this language: "As conclusions of law I find." Then he adds eight or ten distinct conclusions of law, but leaves them unnumbered. In view of these circumstances, we agree with Commissioner Macon that the court intended to set aside the conclusions of law only, leaving undisturbed the referee's findings of fact. The action of the district court in designating the legal conclusions of the referee by number does not avoid this inference. The language used in the judgment, as well as the circumstance that there is no eighth finding of fact, satisfies us that the learned commissioner's view is correct. We may admit that one or more of the conclusions of law set aside by the court were technically right. Yet, if they were not essential to the judgment, and if the judgment is fairly supported by the facts found, under established legal principles, no reversible error was committed. With this explanation, we adopt the conclusion reached by Commissioner Macon in the foregoing opinion, and the judgment of the district court is accordingly affirmed.

It is the duty of an adjoiner to keep strict account of the coal he digs as he approaches his neighbor's line: *Coal Creek Co. v. Moses*, 15 M. R. 544.

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AND WALTER PIERCE V. JONAS J. PIERCE.

*(55 Michigan, 629. Supreme Court, 1885.)

Mutuality is essential to a contract; if no basis appears upon which one who has taken a lease can charge others with its obligations, the latter can not charge him with having taken it in the common interest and claim rights under it.

A case of constructive trust must rest on fraud, either actually intended or resulting from a failure to recognize and observe the rules of business integrity.

Leto familiar and confidant not to be lightly charged. All presumptions are against fraud; it can not be lightly charged against one in whom implicit confidence has been placed, especially if a near relation; such a person is fairly entitled to a favorable construction of any conduct that is reasonably consistent with integrity, and an accusation that may seriously affect his business reputation should not be held proved by circumstances that are merely ambiguous.

Associate buying into adjoining mine. An associate, while managing a mine for the common benefit, took a mining lease to himself on adjoining property; he was not such an agent as one whose entire time is supposed to be paid for: *Held*, that it did not become property in which his associates could claim an equitable interest, and that the mere contiguity of the mine to the subject of his trust did not prevent his making it a matter of private venture.

Any presumption from commingling of accounts may be explained by the circumstances under which made.

Receiver—Insolvency—Allowance for charges. A receiver ought not to be appointed in a proceeding for the partition of property theretofore left in the hands of one of the parties to manage in the common interest, if there is no allegation against him of insolvency; but if he objects to the appointment of a receiver he can not, pending further proceedings, charge for his services.

Appeal from Marquette.

Bill to establish and enforce constructive trust. Defendant appeals.

W. P. HEALY, for complainants.

BALL & HANSCOM, for defendant and appellant.

¹ *Deep River Co. v. Fox*, 1 M. R. 296.

COOLEY, C. J.

The purpose of the bill in this case is to enforce a trust in lands, arising by implication of law from the alleged fraud of the defendant. The parties to the suit are brothers, and heirs at law of James Pierce, who died intestate at Sharpville, in Pennsylvania, December 2, 1874. His estate was a large one, and included railway and banking interests, coal lands, and a blast furnace in Pennsylvania, and mining interests in Marquette county, in this State. Shortly after his death it was agreed between his widow and his five sons that Wallace and Jonas should be appointed administrators, but that the estate for some time should be neither sold nor divided, and that each son should take charge of some portion of the estate, and manage it for the common benefit. Under this agreement the mining interests in Marquette county were put in charge of defendant, who continued to be manager thereof until April, 1881, when an amicable partition was made of the estate, except that the Marquette mining property was not divided, and was still left in defendant's charge.

The bill in this case avers that James Pierce, in his lifetime, purchased a large amount of stock in the S. C. Smith Iron Mining Company, then operating an iron mine in Marquette county. He also advanced a large sum of money to that corporation to enable it to carry on its business. The corporation, however, fell into financial difficulties, and went into bankruptcy; and in 1878 the said Wallace and Jonas, as administrators, purchased its real estate, and commenced mining operations, and operated a saw-mill thereon, by consent of all the heirs. The mine was then called the Cheshire mine. The bill further avers that in the year 1879 the defendant suggested the propriety of making explorations on the north line of the Cheshire mine property for iron ore, and it was agreed that defendant should endeavor to get a lease of the property adjoining on the north, for the benefit of the estate, for the purpose of mining iron ore for a royalty; that such lands at the time were of little known value, but the heirs were willing to expend some money in explorations thereon; that defendant informed the others that he could not take such a lease as administrator, but would take it in his individual name for the benefit of all,

to which the other heirs assented; that he thereupon did procure such a lease, and the heirs took possession and commenced operations thereon, calling the leased lands the North Cheshire; that within a year \$5,000 were expended thereon, without apparent valuable result, and the cost charged to the profit and loss account of the Cheshire mine—the Cheshire and North Cheshire being treated by all parties as one property.

The bill then states the negotiations for a partition of the estate between the heirs, which was accomplished in April, 1881. In the course of these, defendant proposed to take the Marquette mining property at \$10,000, he representing that the property, as a mine, was valueless, and could only be regarded as wild land, with a saw-mill thereon, and certain property for mining purposes at the mine; that afterward, in November or December, 1880, complainant Frank Pierce proposed to take half the Marquette property, to which defendant assented, but in January or February following, defendant said he would not take it at his valuation until he had seen it again; and in March he went to Marquette, and on his return wanted to take to himself exclusively all the Marquette mining property that belonged to the estate. Complainants, however, had been investigating its value, and had learned that the profits for the last year had been \$7,500, and thereupon insisted on taking said property with defendant in equal shares. They charge defendant with keeping them in ignorance of the value of the property in order to obtain it himself at a nominal valuation. The result of the negotiations was that the five brothers were left joint owners of the Cheshire mine, while the other property was divided.

The bill then avers that for the first time the defendant, on April 5, 1881, informed complainants that the lease of the North Cheshire property was his, and he should keep it as his own; to which they objected and protested, claiming that the North Cheshire was developed into a mining property from wild land by the money and exertions of complainants and defendant in common, and that they regarded, and should continue to regard, it as common property. Up to this time they had had implicit confidence in defendant, but they charge that he used his position as manager of the common property to obtain possession of the North Cheshire, and in the absence

of complainants, in April, 1881, he directed the bookkeeper of the Cheshire to separate the amounts expended on the North Cheshire from the Cheshire, which they protested against when it came to their knowledge, and refused to ratify the action. The bill then prays that the Cheshire mine property be sold, under the order of the court, and the proceeds divided; that defendant render an account in respect to the North Cheshire property, now called the Swanzey; and that a receiver be appointed, pending the suit, and commissioners to make partition.

The answer admits the arrangement for carrying on the Cheshire mine for the benefit of all the heirs, but avers that in the spring of 1880 a division of the property of the estate among the several parties entitled thereto was agreed upon, under which defendant was to have the mining property in the county of Marquette at the value of \$10,000. He was also to have one half the accounts of the mine, the other half being set over to complainant Frank Pierce. At that time the entire property of the estate was appraised, and a division of the whole agreed upon. No conveyances were then made, but the parties entered into possession of the greater part of the portions assigned to them, respectively, and managed and carried them on as their individual property. The division was to date from April 1, 1880, and each received the profits of his portion from that time. The Marquette mining property was considered to belong to defendant from that time; but in the latter part of the following December complainant Frank Pierce decided that he wanted a one half interest in the same, and defendant agreed thereto, and such changes were made in the division of the estate as were rendered necessary thereby. Early in the following spring the other complainants became dissatisfied with the valuation of the property as it had been agreed upon, and insisted upon a change in the division, which defendant declined to assent to; but finally, about the 5th of April, 1881, it was agreed between defendant and complainants that they should all take equal interests in said mining property, subject to all the liabilities, and with all the profits accruing thereto, from the 1st of April, 1880, and that defendant and Frank Pierce should have each a half interest in the accounts of the mine up to that date. This division was

consummated by deed, and defendant was left in the management.

The answer further states that in the year 1879, by mutual agreement of the parties, explorations were entered upon on their common property to find other ore, if possible, as the old mine appeared to be about worked out. A shaft was sunk and other work done near the north line of the property, and up to the division of April 1, 1880, about \$1,100 had been expended in these explorations. Thereafter the defendant continued them on his own account, expending \$1,600 in addition to what had been expended before, and during that year, with a view of taking a lease of the property adjoining on the north, he expended about \$1,000 upon that. All the accounts of explorations, both upon the Cheshire mining property and upon that to the north, were kept together on the books of defendant, who, in the division as it then stood, was the owner of the Cheshire mine; but the accounts were separated after the change in the division in December, when it was agreed that Frank Pierce should take a half interest in the Cheshire mine, and after the final division, about April 5, 1881, whereby all the parties became equally interested in the Cheshire mine, the sum which had been expended on the North Cheshire property was charged over on the books to defendant. From the date last mentioned the mining business on the Cheshire mining property was carried on by all the parties as a partnership, under the name of "The Cheshire Iron Company," and that upon adjoining land to the north was carried on by defendant alone under the name of "The North Cheshire Mine."

The defendant denies positively that he ever undertook to obtain a lease or leases for the benefit of the estate, in his own name or otherwise. He avers that he commenced efforts to obtain the property since called "The North Cheshire" property, and now, the Swanzey, after the division of 1880, and while the Cheshire mine was understood to be his own; that he did not ascertain all the owners until July of that year, and did not obtain a contract for a lease until in November following. He denies all misrepresentation or deception in respect to the Cheshire mine, and avers that the accounts of the mine were kept at Sharpville, Pennsylvania, where the complain-

ants had access to them at all times. He says he always claimed the North Cheshire property as his own, after he acquired it, and denies any equitable claim on the part of complainants to any participation therein.

The case was heard on pleadings and proofs, and decree rendered affirming the right of complainants to an equal participation with defendant in the "North Cheshire" mine property, and for an accounting and partition. A reference for the appointment of a receiver was also ordered.

From this abstract of the pleadings it will appear that the case for complainants depends upon their establishing the fact that defendant, when he took a lease of the property since known as the North Cheshire mining property, and now as the Swanzey took the same under circumstances which charged it with a trust in his hands for the benefit of complainants. The bill avers an understanding that it was to be as it was acquired by defendant for the common benefit of all the heirs; but it also makes out a case of constructive trust against the defendant, arising from the fact that the explorations to determine the value of the property were made by defendant, as manager of the Cheshire mine, and at the expense of that property, when it was owned by all the parties jointly, and when defendant was managing it in the interest of all, and under obligation to give to all the benefit of his knowledge, and of such acquirements as he should make at the common expense.

Any understanding, preceding or contemporaneous with the North Cheshire property lease, that defendant should procure such a lease and hold it for the benefit of all the heirs, we do not find made out. We do not think that if, immediately after its acquisition, he had insisted with the others that he had taken the lease in the common interest of all, and if he had undertaken to charge them with its obligations, he would have been able to establish against them a duty of any sort, supported by anything done or said by themselves, to participate in the chances which would attend the taking of the lease, and the experiment of opening mines on the leased lands. He must, as we believe, have failed in showing that they had consented to take any such chances or to participate in any such experiment. We therefore put out of view all questions of the

legal validity of any such understanding, contenting ourselves with saying we do not find it proved. Neither do we find that, independent of express agreement, a case of constructive trust is made out. Such a case must rest upon fraud, either actually intended or resulting from a failure to recognize and observe the rules of business integrity. A charge of the kind, especially when made against a near relative, who, up to the time of making it, had been implicitly confided in, ought not to be lightly made or accepted. All presumptions must be against it: *Campau v. Lafferty*, 50 Mich. 114. The accused party, in common fairness, is entitled to a favorable construction of any conduct reasonably consistent with integrity; and the accusation, which might seriously affect his business reputation for life, should not be held proved on facts and circumstances which are merely ambiguous, and may, therefore, if fully understood, be consistent with honesty.

In this case there are some circumstances which, standing by themselves, without explanation, look unfavorable to the defendant. He did, undoubtedly, prospect on the North Cheshire property and acquire a lease of it while managing the Cheshire mine. He expended money on the leased land during that period. He mingled the accounts of expenses with the accounts of the Cheshire mine; but when all the facts appear, the case is relieved of its unpleasant features.

In the first place, on the facts as they appear when all disclosed, the defendant, though manager for all the parties to some extent, was not, and had not been, in the position of owing to the other heirs the duty to give to the common business all his time. He had some portion of his father's estate in charge; others of the heirs had other interests in charge in the same way; but we find nothing in the case resembling the employment of agents whose entire time and abilities are paid for while the employment continues. On the contrary, we think these parties were fully at liberty to engage in independent employments and ventures of their own, as they, undoubtedly, all of them did. There was nothing, therefore, in the mere fact that defendant, when prospecting, and when acquiring a lease of adjoining lands, was manager of the Cheshire mine, that could preclude his taking the lease in his own interest.

But, in the second place, we think the defendant has established the fact that after April, 1880, he understood, and had a right to understand, that the Cheshire mine was apportioned and set off, by agreement, from the common property to him; and that this understanding fully accounts for and excuses his mingling the North Cheshire accounts with those of the Cheshire mine until the following December, at which time his brother Frank insisted upon and was accorded an interest in the Cheshire mine, when a separation of accounts became necessary, and was made. When thus explained, we see that the fact that the accounts were mingled while defendant was thus understood to be owner of the Cheshire mine is not, by itself, even a suspicious circumstance, much less a circumstance proving fraud.

But complainants insist that the understanding whereby defendant was to take the Cheshire mine at a valuation of \$10,000, was assented to on their part in consequence of false and deceptive statements made by defendant for the purpose of procuring that property to himself for a very small fraction of its value; that when they discovered the facts, they insisted on sharing equally in the mine, and have done so; and that defendant can not, therefore, be permitted to retain advantages acquired by him, while the understanding which was arrived at only in consequence of his fraud continued. But if it be true, as complainants charge, that defendant fraudulently undertook to acquire the Cheshire mine for less than its value, we do not see that the fact aids the complainants in this suit. That fraud was apparently redressed when defendant consented that the Cheshire mine should be held in common by all; and the attempt to perpetrate it can not, by itself, work a forfeiture of rights by defendant. If he had, before the final adjustment, acquired independent interests, he had a right to retain them; and the complainants, in order to establish any rights for themselves in respect to such interests, would be under the necessity of laying a basis therefor in contract. But, as we have already said, no contract that defendant should obtain a lease of the North Cheshire property in the interest of all is made out; and we do not think there was even an understanding to that effect. The defendant made a venture there which proved to be successful, and

which, for that reason, complainants are now desirous to share in, but it was, perhaps, quite as likely at the outset to prove unsuccessful, as thousands of mining ventures in the same region have done heretofore. The mere fact of contiguity to the mining lands owned by the parties in common, neither made out against complainants an obligation to participate in the risks, nor against defendant an impediment to taking the venture upon his own hands. Each party was at liberty to act independently of the other in the matter, except as by contract they might agree to joint expenditures and joint risks, which in this case we do not find they ever did.

Our conclusion is that this bill, so far as it claims rights for complainants in the North Cheshire or Swanzey mine, must fail. Complainants are entitled to a severance of interests in the Cheshire mine, and may take decree for an accounting and a sale for the purposes of a partition, if they desire. But we do not think there is any case for a receiver. No allegation of insolvency is made against defendant, and complainants have been satisfied heretofore to leave their interests in his hands. But, pending further proceedings, if complainants elect to take them and defendant objects to a receiver, he should not be allowed to charge for his own services. Defendant is entitled to costs of this court, but the costs in the circuit court will be left to the discretion of that court, to which the record will now be remitted.

SHERWOOD and CHAMPLIN, JJ., concurred.

CAMPBELL, J.

The object of this suit is to reach a leasehold interest in mining property which stands in defendant's name, but which he is alleged to hold for the common benefit of himself and complainants, as partners. The case contains a great deal of testimony which is chiefly valuable as showing the relations of all the parties arising out of their father's intestacy. Much of it does not go very far toward settling this controversy, which arises out of a transaction detached for most purposes from all the rest. As connected with a final division of the paternal estate, it has some force. Complainants and defendant are brothers, and constitute all the heirs of James Pierce,

deceased, who resided in Pennsylvania, and died intestate in December, 1874, leaving a widow still surviving. Among his other possessions was an interest in and a debt against an iron mine, then known as the "S. C. Smith Iron Mine," having some collateral and appurtenant interests besides the mining land in Marquette county. Complainant Walter Pierce and defendant were appointed administrators in Pennsylvania, but not appointed in Michigan. The several sons were employed more or less in the management of different classes of property, in Pennsylvania and elsewhere, for the general account, and in 1877 this mine was put in operation again under the direction of the estate, defendant being manager, with the consent of the widow and heirs. In 1879 the title was purchased for the estate at bankruptcy sale, and was thereafter carried on by the consent of all the parties under the nominal charge of the administrators, and under defendant's special supervision, until the distribution hereafter mentioned.

In April, 1881, after a series of propositions and figurings, a division was got at which was intended to parcel out the estate between the widow and heirs, and most of the property outside of this mine was set apart in separate ownership to the widow and heirs. This Smith iron mine, which had become known as the Cheshire Iron mine, was at first in these negotiations set down to defendant, and subsequently to him and another, jointly. Finally, on a discovery, or an alleged discovery, that it was more valuable than it had been set down in the estimate, it was concluded that it should be owned by all the sons equally, and worked for their benefit as partners under defendant's supervision. This distribution was completed April 1, 1881, to be retrospective so far as the use and benefit of the various parcels were concerned, so as to give each the profits of such use from the same time in the previous year. On the thirty-first day of December, 1880, in pursuance of previous negotiations, defendant took in his own name the option of a lease of an adjoining parcel of mining land, lying north of the mine thus held in common, and subsequently called the North Cheshire. He got a lease in due form on the fifteenth of April, 1882. Complainants claim that this acquisition belongs to the partnership. Defendant claims it as his own.

Some preliminary questions were suggested concerning the title of the principal property, and the necessity of making the widow a party. It does not seem to us that any important principle is involved here. It can not be claimed that, as Pennsylvania administrators, or as administrators at all, the two parties thus designated could have carried on this Michigan mine. They derived their power entirely from the personal consent of the widow and heirs, who were all of age. By mutual consent the widow relinquished all interest in this property, and it became the property of the sons, who became partners, but who took the property just as it had stood previously, and were entitled to hold it, with all its appurtenances, as they and the widow would have done if no change had been made. It is not claimed by defendant that any other rule was intended. The only contention is whether this North Cheshire property was included.

It is claimed and shown that when the article of distribution was executed, defendant asserted his claim to separate ownership of this. But it is also clear that this was there denied. If it had, theretofore, been a partnership interest, inasmuch as all these heirs took an equal share in the old mine, and kept it in common, this assertion could not change the facts. There was, we think, nothing at that time which could amount to an acquiescence; and in the paper then executed there was no such designation of the Cheshire mining property as would exclude it, if really owned together. Upon this fact there is a direct conflict of testimony. It appears that the original exploration, and the working up to the time of the distribution, had been with the funds and appliances of the Cheshire Company, although defendant claims he meant and ordered the keeping of the accounts and application of expenses to be kept separate. The actual separation on the books seems to have been made somewhat later, and the accounts for money expended remained open for some time. The houses erected by the Cheshire Company were used for the North Cheshire miners, but defendant claims this was to be made good by rent. There was also some mingling of products, which both parties claim as operating differently from each other's theories. It is also shown that the joint properties would be of considerable service to each other if held together.

In the conflict of testimony as to what was actually intended, I am satisfied, from a comparison of the whole case, that the acquisition of the North Cheshire was first thought of in connection with the other mine, and that it was understood among the brothers, and by the widow, that this was in contemplation. If so, then the use of the Cheshire facilities and money to obtain and develop it was the natural result. The whole course of business, including these expenditures and the manner of their first entry on the books, all have some bearing in confirmation of complainants' testimony.

The case being one of fact entirely, and the decision below according with what seems the practical understanding and conduct of the parties before the full value of the speculation became known, I think it should be affirmed.

1. Two years *laches* held sufficient to prevent rescission of foreclosure sale on trust deed effected on deficient notice and for insufficient price: *McBride v. Gwynn*, 33 Fed. 402.

2. Where a partner buys into a mine in his own name with the firm funds, equity will declare a trust in favor of his associate and for the necessary accounting: *Kayser v. Maughan*, 8 Colo. 339.

3. The patentee of a mining claim, who through fraud, mistake or other reason cognizable in equity, has procured the legal title which of right should go to another, will be decreed to hold in trust for the rightful owner: *Bassick M. Co. v. Davis*, 17 Pac. 294.

WATERMAN V. WATERMAN.

WATERMAN V. PORTER.

(11 Sawyer, 489; 27 Fed. 827. U. S. Circuit Court, District of California, 1886.)

The real consideration for a contract to convey may be shown, although the contract states only a nominal one.

¹ Adequacy of consideration for a mining venture. Where a party advances several thousand dollars to develop certain silver mines, in consideration of which he is to be repaid out of their first product, and receive, in addition, an undivided fractional part of the mines: *Held*, that the contract can not be avoided on the ground that the consideration was inadequate.

Idem. On the same state of facts: *Held*, that the contract can not be avoided on the ground that the property to be conveyed is uncertain, or that the performance of the contract would work hardship.

² Option and mutuality. In an action on a contract, want of mutuality can not be set up as a defense by the party who has received the benefit, simply because it was left optional with the other party as to whether he would enforce his right.

Question of sale or security. Evidence considered, and held to not sustain the position that the contract to convey was given simply as security for the money advanced.

In Equity.

The actions referred to in the following opinion were brought by the complainant, as the assignee of her deceased husband, to compel the specific performance of certain contracts in writing entered into with him by the defendants. One of the contracts was as follows:

“SAN BERNARDINO, May 14, 1881.

“For and in consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby agree that, at any time within twelve months from this date, upon demand of J. S. Waterman, or his heirs, administrators or assigns, I will execute to him a good and sufficient deed of conveyance to an undivided twenty-four hundredths (24-100) of the following mines, known as the Alpha, Omega, Silver,

¹ *North Georgia Co. v. Latimer*, 12 M. R. 367.

² *Corson v. Mulvany*, 49 Pa. 88; 88 Am. Dec. 485.

Glance and Front, each being six hundred feet front by fifteen hundred feet long; and the same interest in all the lands that may be located or have been located for the development of the above mines, with such machinery and improvements as are to be placed upon the same; all subject to the same proportion of expenses, which is to be paid out of the development of the above property; all situated near the Grape Vine, in the county of San Bernardino, State of California.

“(Signed) R. W. WATERMAN.”

The other contract was of a similar character, but was signed by G. L. Porter, who agreed therein to convey, on demand, to J. S. Waterman, three one-hundredths of the same mines. The other facts are sufficiently stated in the opinion of the court.

SAWYER, Circuit Judge, orally.

This case of Waterman against Waterman is a suit in equity to compel the specific performance of a contract to convey portions of the silver mines described in the bill of complaint. I have gone through the record very carefully. The testimony is very voluminous, and the principal questions are questions of fact. It would be unprofitable to enter into a long discussion of the evidence, and I shall only announce my conclusions in the matter.

In my judgment the plaintiffs are entitled to a decree for the conveyance of the property and for a reference to take an account of the profits of the undivided portion of which a conveyance is sought.

The legal points made by the defendants are briefly: first, insufficiency of consideration. The consideration in the written agreement of conveyance mentioned is one dollar. If the parties agree to sell for one dollar, I do not see that anybody has a right to complain. On the face of the bill and certainly upon the testimony, there is nothing to justify a holding that the consideration, expressed or real, was inadequate. If the amount expressed is adequate for a deed of conveyance, it certainly ought to be adequate to sustain a contract to convey. Besides, it appears that that was not the real consideration at all. The failure to state the full consideration makes no differ-

ence. The parties took up a mining claim, had it partially prospected, and, being impecunious, had no means to develop the mine and procure machinery. They entered into an agreement by which another party was to furnish the money, and they gave a contract to convey a part of the property, and besides agreed to pay the money back out of the first proceeds of the mine. The capitalist, J. S. Waterman, advanced in all something over twenty-six thousand dollars, and in addition to that his brother, R. W. Waterman, who was one of the parties, received a remission of all the indebtedness due from him to J. S., which was about eleven thousand dollars; and that, with three thousand five hundred dollars to pay private indebtedness, was the real consideration for the contract. J. S. Waterman did not choose to take a conveyance at the time for the reason that he did not wish to put himself in the position of a partner. This was substantially, *on his side*, an option. For the development of the mine he was willing to furnish the funds and take that risk for a share of the mine in case it should prove valuable, but he was not willing to assume any indebtedness that a mining partnership might incur. I think there is no insufficiency of consideration.

The next point is the uncertainty of the property conveyed and the hardship of performance. I do not think it is uncertain—the property being mines well known by name, and necessarily described in the records of the claims—nor do I think it would be a hardship to enforce the contract. The names and records furnish the means of sufficient identification. There is no hardship about it. It would be a great hardship to the other party if it should not be enforced. The party who advanced the money and who was entitled to receive the conveyance, is the one who took all the risk. He had everything to lose and nothing to gain on the theory set up by the defendant, while the other side had everything to gain and nothing to lose. The hardship would be directly the other way. It was complainant's assignor's money that was invested and it was his money that secured the mines. If it turns out that the mines are valuable, and that the conveyance would be valuable to him, the result is still more valuable to defendants.

The next defense set up is want of mutuality. You might as

well say that there was a want of mutuality in a promissory note, and that a payee could not recover because he could not be compelled to take the money. If the obligors chose to give him this option, and to receive the large consideration of twenty-six thousand dollars, which was to be paid back only out of the first products of the mine, besides a large indebtedness which he was not to receive back at all—if they were satisfied to give him this option, I do not think they can complain if he should choose to accept the option when it turned out to his advantage to do so, even if he was anxious to know the extent of his liability, and to refuse to give authority to them, on the other side, to run him into debt to an unlimited extent. I do not perceive why he could not make the agreement with the consent of the other parties, and why it should not bind the other parties when made. He gave an ample consideration. Whatever effect this might have upon the rights of creditors is outside of the present question. The defendants agreed to it, and it was sufficient as to them.

Other defenses are pleaded, which I do not think are sustained by the evidence. One is that this contract was only given as security. Manifestly it was not intended for any such purpose. If it was security, the security would be no better with, than without it, because the money was to be paid only out of the mine, in any event; and if the mine did not produce the money, it would not be paid, and it would have little value as security. Besides, he absolutely gave up an indebtedness not to be returned or secured. That claim as to security was never made until set up in the answer. Even when the complainant first wrote to defendants to demand a conveyance, they did not set up security at all as a ground of defense. The ground relied on, then, by defendant, Waterman, was, that his brother only took it so that, in case it ever came to him, he could give it to defendant's own children. I do not think the testimony is sufficient to justify the court in coming to that conclusion. Evidently the deceased, James S. Waterman, to whom the contract was given, did not act upon that supposition; neither is there any evidence that any of these parties did, until after his death, nor even till the conveyance was demanded. I shall therefore order a decree, in pursuance of the prayer of the bill, for conveyance of the

property, and that it be referred to the master to ascertain the profits that have been made.

The other case, against Porter, is for the same thing, except for a smaller amount. Waterman agrees to convey twenty-four hundredths and Porter three hundredths of the mine. The only defense that Porter sets up is that it was merely as security. Manifestly he did not set that up in response to the demand of the complainant for a conveyance. He seemed at that time to recognize the liability, by implication at least, but was not certain to whom the conveyance should be made. He thought that the family should first settle their affairs before he was called upon to convey; but briefly, the defense stands upon the same footing as in the other case. These parties all obtained assistance from the deceased, and assignor of the complainant here; and through his aid and at his risk, secured mines that turned out to be valuable, one of them now having one half and the other nearly one quarter. Justice requires that they convey the small part so richly earned, and which the defendants agreed to convey.

I am satisfied, from the testimony, that the same decree should be made in this case that was made in the other.

BOURNE ET AL. V. THE NETHERSEAL COLLIERY COMPANY.

(L. R., 19 Q. B. Div. 357. Queen's Bench, 1887.)

Statutory modes of weighing exclusive. Where a statute provides that miners shall be paid according to weight of mineral got, and provides further how that weight shall be ascertained and for deductions for slack, miners can not be held to contracts providing for other and different modes of weighing.

¹ An act intended to prevent a class of contracts found to constantly engender distrust and suspicion of unfair dealing between master and miner can not be countervailed by special contracts made in disregard of its terms.

Appeal from the judgment of the Judge of the County Court of Leicestershire at Ashby-de-la-Zouch.

¹ *Arnott v. Pittston Coal Co.*, 68 N. Y. 558; 23 Am. R. 190.

The plaintiffs were employed in the defendants' colliery.

The action was brought to recover the sum of £20 8s. for wages earned by the plaintiffs by getting coal for the defendants. The plaintiffs also claimed the same amount, as having been illegally and improperly deducted from their wages by the defendants, without the assent of their check-weigher at the colliery, and against the provisions of the Coal Mines Regulation Act, 1872.¹

The plaintiffs were employed under the following agreement: "I, the undersigned, hereby agree to serve the Netherseal Colliery Company, Limited, proprietors of the Netherseal Colliery, near Burton-on-Trent, from this date, and to obey the general and special rules and regulations of such colliery, a copy of which I hereby acknowledge to have received. I also agree that the 'mineral contracted to be gotten' re-

¹35 and 36 Vict. c. 76. By s. 17: "Where the amount of wages paid to any of the persons employed in a mine to which this act applies depends on the amount of mineral gotten by them, such persons shall, unless the mine is exempted by a secretary of state, be paid according to the weight of the mineral gotten by them, and such mineral shall be truly weighed accordingly.

"Provided always, that nothing herein contained shall preclude the owner, agent or manager of the mine from agreeing with the persons employed in such mine, that deductions shall be made in respect of stones or materials other than mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets or hutches being improperly filled in those cases where they are filled by the getter of the mineral or his drawer, or by the person immediately employed by him, such deductions being determined by the banksman or weigher and check-weigher (if there be one), or in case of difference, by a third party to be mutually agreed on by the owner, agent or manager of the mine, on the one hand, and the persons employed in the mine, on the other. * * *

"If any person contravenes or fails to comply with, or permits any person to contravene or fail to comply with this section, he shall be guilty of an offense against this act."

By s. 18. "The persons who are employed in a mine to which this act applies, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this act referred to as 'a check-weigher'), at the place appointed for the weighing of such mineral, in order to take an account of the weight thereof on behalf of the persons by whom he is so stationed. He shall have every facility afforded to him to take a correct account of the weighing for the persons by whom he is so stationed."

ferred to in the Coal Mines Regulation Act, 1872, shall in all cases mean and include only such pieces of clean coal as can not fairly be passed through an ordinary loading rake, the clear spaces between the prongs of which are two and a half inches wide. And I also agree to give or take fourteen days' notice to determine my service; and I, the undersigned, on behalf of the Netherseal Colliery Company, Limited, hereby agree to employ the above named person upon these terms and conditions, subject to all stoppages which may arise from accidents, want of trucks, slackness of trade or other causes beyond our control."

A strike having taken place, a proposal was made by the men to return to work on certain terms, one of which was "that the average be taken at Billy Fairplay only." This proposal was not acted on, but the men returned to work, it being agreed that coal should be paid for at 16*d.* per ton with a premium of 2*d.* per ton in certain cases. This agreement contained the following clause: "No slack whatever will be paid for except that sent out as heading slack; all other slack will be deducted from the different places in proportion to their loading."

The following facts with regard to the weighing and deductions appeared on the county court judge's notes:

The coal was put into tubs in the pit, and the tubs were then put on a tramway and carried to the pit's mouth, where they were hoisted to the surface, unhooked and wheeled along rails to a weighing machine three yards from the unhooking point. At the weighing machine was an office occupied by the weigher and the check-weigher. The coal was then weighed and the weights were taken down by the weigher and check-weigher. The coal was then moved on trucks along a tram line to a place where it was sorted into classes and after it had been sorted the trucks were taken to a place forty yards distant from the office of the weigher and check-weigher, where the coal was shot down six feet onto a screen forming part of a machine called "Billy Fairplay" and a boy who was only in the employ of the company, noted from a dial the weight of slack that had gone through the screen. At the end of the week the check-weigher handed to the men the weights, so as to guide them in the amount of wages to

be received. When the men went to the cashier, they received pay tickets, showing the amount of weight on which they were entitled to wages, and their wages. The amount shown on the pay tickets, which was the amount paid, was less than the amount of the weights given to the men by the check-weigher, the weight of the slack which had gone through the screen of "Billy Fairplay" being deducted. The company had advised the men to appoint another check-weigher to attend "Billy Fairplay," and offered to pay him themselves, an offer which the men did not accept.

The county court judge gave judgment for the defendants, and the plaintiffs appealed.

ALFRED YOUNG, for the plaintiffs.

MACCLYMONT, (HEXTALL with him), for the defendants.

STEPHEN, J.

My view is that S. 17 of the Coal Mines Regulation Act, 1872, determines the present case. That section provides that persons employed in the mine shall "be paid according to the weight of the mineral gotten by them, and such mineral shall be truly weighed accordingly." The case of *Jones v. Llynvi Colliery Co.* (not reported) shows that the mineral to be weighed may be the coal without the slack, if it is so agreed. The proviso in the section allows certain deductions, but enacts that those deductions shall be determined by the banksman or weigher and check-weigher (if there be one). Here the deductions were not determined in the manner pointed out by the act for they were determined neither by the banksman or weigher, nor by the checkweigher, but by the boy who managed the machine called "Billy Fairplay." It is said that it was agreed that this mode of calculating the deductions should be adopted, but I am of opinion that it was not competent to the parties to get out of the provisions of the act of Parliament by means of such a contract. Our judgment, therefore, will be in favor of the plaintiffs for the amount claimed.

WILLS, J.—I am of the same opinion. The plaintiffs' claim is for the amount of certain deductions which they allege to

have been illegally made. They claim payment on the weight ascertained in the only way which the statute allows. There is a proviso in S. 17, that nothing in the act shall preclude agreements for deductions "in respect of stones or materials other than mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten." This proviso is satisfied by allowing contracts as to the making of such deductions, but it is not intended to go further and to provide that the deductions so agreed upon may be ascertained by some method different from that provided by the act. If this had been the intention it would have been expressly stated. The words are "such deductions being determined by the banksman or weigher, and check-weigher (if there be one)." In the present case there was a check-weigher but the deductions were not determined by him. The act was meant to prevent the adoption of methods of ascertaining deductions other than those provided, its policy being to stop the making of certain contracts which were found to engender constant distrust and suspicions of unfair dealing, and so to produce disastrous results to the industry of the country. The deductions here were not determined by the banksman either with or without the check-weigher, but by the boy who had charge of the machine called "Billy Fairplay." For these reasons I am of opinion that the plaintiffs are right in their contention, and that the only deductions which the defendants have any right to make are those which are ascertained in accordance with the 17th section of the statute.

Appeal allowed.

THE EXECUTORS OF JAMES C. LORD, Deceased, ET AL.
V. THE CARBON IRON MANUFACTURING COMPANY.

(38 New Jersey Equity, 452. Court of Chancery, 1884.)

¹Land on a lower level is under a natural servitude to that located above it, to receive the water flowing down to it naturally.

No remedy for ordinary flow. It is a natural right of each of the owners of two adjacent mines, neither being subject to any servitude to the other, to work his own mine in the manner most convenient and bene-

¹*Jones v. Robertson*, 15 M. R. 703.

ficial to himself, though the natural consequence may be that some injury will accrue to his neighbor.

For damages resulting from natural causes, or from lawful acts done in a proper manner, the law gives no redress, but when one of two adjoining mine owners conducts water into his neighbor's mine, which would not otherwise go there, or causes water to go there at different times and in quantities larger than it would naturally go there, he is answerable for the damages.

Damages from perlocating water are an injury for which no redress can be granted.

Removing pillars in adjoining mine enjoined. Equity will restrain one of two adjacent mine owners from removing the supports which prevent the surface of his mine from caving in when it appears that such removal will result in the destruction of his neighbor's mine.

A mandatory injunction to prevent flooding, forcing the defendant either to keep on pumping, or to build, perhaps, impracticable bulk-heads, refused on the facts, although defendants' predecessors in title had themselves got over the line and made the aperture in question.

On application for injunction heard on bill and affidavits, and answer and affidavits, and order to show cause.

S. H. LITTLE and THEODORE LITTLE, for complainants.

H. C. PITNEY, for defendants.

VAN FLEET, V. C.

The parties to this suit own adjoining iron mines in the county of Morris, and work the same vein of ore, but at different levels. The complainants' mine is in the lower one. The defendants stopped work in their mine in the fall of 1882, having prior to that time removed all the ore which could be removed with safety to their mine. Most of the iron ore remaining in their mine is in the pillars and walls, which were left while mining operations were being carried on, as supports to prevent the surface from caving in. The defendants' mine adjoins the Rockaway river, its western wall being about seventy-five feet, vertical measurement, below the bed of that stream. The surface above both mines is low and wet, and both carry a great deal of water, and are what miners call wet mines. The complainants are actively engaged in working their mine. They say they have 90,000 tons of ore in sight, and it is esti-

mated that 490,000 tons may be taken out of their present shaft. Their mine, they say, is worth \$150,000. The special reason why the complainants seek the aid of the court at this time is, that the defendants have recently avowed a purpose to reduce the pillars of their mine, and take out all the ore which can be taken out at a profit, and let their mine fill with water. They admit by their answer that such is their purpose, and they claim the right to reduce the walls and pillars of their mine regardless of the effect that their reduction may have on the mine of the complainants. They admit that they stopped work in their mine in the fall of 1882, having prior to that time taken out most of the ore that was worth taking out, except what was in the pillars, and they say that it is usual, when a mine is finally abandoned, to take out the pillars which have been left to support the surface, commencing at the bottom and working upward, and when the pillars are reduced to let the mine cave in if it will.

Two communications now exist between the two mines. They are both the result of trespasses committed on the lands of the complainants. The Carbon Iron Company were the predecessors in title of the defendants. While they owned the mine now owned by the defendants, and as the answer says, somewhere about the year 1872, they, by accident, worked over the line about twenty-one feet, on the lands of the complainants. At the time this trespass was committed, the complainants had not sunk their shaft nor mined any ore near the defendants' mine. The other trespass was committed by the defendants' lessees some time between February, 1881, and the fall of 1882. It was committed at a point lower down on the vein, and extended over the line, as the defendants say, only about four feet horizontal measurement, but along the vein a much greater distance. The complainants began to sink their shaft in 1879, and in carrying it down, broke into both the openings made into their lands by the trespasses just mentioned. The apertures are the result of the joint acts of the parties: in the one case, of the acts of the Carbon Iron Company and the complainants, and in the other of the acts of the defendants' lessees and the complainants. It is proper to state here that it is not disputed that the complainants sank their shaft at the only point at which it could be sunk to reach the ore lying

adjacent to the defendants' mine. The complainants' mining engineer swears that this is the fact, and, in demonstration of the truth of his statement, he says that all previous attempts to sink a shaft at other points on the complainants' land to reach this ore failed, in consequence of the difficult character of the ground encountered. The defendants do not deny the truth of this statement.

The complainants, on these facts, ask two kinds of prohibitory relief; first that the defendants may be enjoined from removing the pillars and walls and other supports of their mine to such an extent as to endanger the caving in of the surface; and secondly that they may be enjoined from permitting the water to flow from their mine into the complainants' mine through the two apertures. The defendants deny the complainants' right to either measure of relief. They claim the right to remove all the ore from their land without regard to the effect the removal may have on the complainants' mine. They say that their right to do so is in no way restricted or impaired by the fact that their predecessors in title, and their lessees, have unlawfully made openings into the complainants' land, in consequence of which, if the surface of their mine caves in, the mine of the complainants will be submerged and destroyed. They do not attempt to justify the trespasses. They say that they were committed unintentionally, and that while this does not relieve the persons who committed them from the legal consequences of their wrongful acts, still the complainants' only remedy is an action of trespass against the persons who invaded their possession, in which they must recover their damages once for all. They also say that, however ruinous or destructive their threatened action may be in its consequences to the complainants' mine, yet, as they did not make the apertures, nor commit the trespasses which caused them, they can not be held liable, either at law or in equity, for any injury the complainants may suffer from them.

For water which gets into the complainants' mine from the defendants', by gravitation or percolation, or by any other natural means, it is clear that the defendants are in no way responsible. Land on a lower level is under a natural servitude to that located above it to receive the water flowing down to it naturally. Nor can the defendants be held liable for any

injurious consequences resulting to the complainants from work done by the defendants in their mine in a skillful and proper manner. It was declared in *Smith v. Kenrick*, 7 C. B. 515, to be the natural right of each of the owners of two adjacent mines, neither being subject to any servitude to the other, to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from negligent or malicious conduct. The rule defining the rights and liabilities of adjoining mine owners, may be stated in this form: For damages resulting from natural causes, or from lawful acts done in a proper manner, the law gives no redress, such losses being regarded as *damnum absque injuria*; but where one of the two adjoining mine owners conducts water into his neighbor's mine which would not otherwise go there, or causes it to go there at different times and in larger quantities than it would go there naturally, he commits a wrong which the law will redress. This rule, stated in a more amplified form, was applied in *Baird v. Williamson*, 15 C. B. N. S. 376.

Erle, C. J., in delivering the opinion of the court in that case said: "The defendants, as occupiers of the higher mine, have no right to be active agents in sending water into the lower mine. The plaintiffs, as occupiers of the lower mine, are subject to no servitude of receiving water conducted by man, from the higher mine. Each mine owner has all rights of property in his mine, and among them the right to get all the minerals therefrom, provided he works with skill and in the usual manner. And if, while the occupier of a higher mine exercises that right, nature causes water to flow to a lower mine, he is not responsible for this operation of nature. If the owner of the lower mine intends to guard against this operation, he must leave a barrier at the upper part of his mine, to bay back the water of his higher neighbor. The law imposing these regulations for the enjoyment of somewhat conflicting interests, does not authorize the occupier of the higher mine to interfere with the gravitation of the water, so as to make it more injurious to the lower mine, or advantageous to himself." The justice and good sense of this rule are patent. It has controlled most of the adjudications on this subject.

Among the cases which have been decided by this principle are the following: *Crompton v. Lea*, L. R. 19 Eq. 115; *Smith v. Fletcher*, L. R. 7 Ex. 305; and *Locust Mountain Co. v. Gorrell*, 9 Phila., 247.

The only case containing any remarks tending to support the extreme ground taken by the defendants is *Olegg v. Dearden*, 12 Q. B. 576. The defendant in that case had made an opening into the mine occupied by the plaintiff. An action was then brought which was subsequently referred to an arbitrator. The arbitrator made an award to the plaintiff for the damages he had sustained by the opening. The defendant paid the damages so awarded, and the plaintiff accepted them. Afterward the plaintiff brought a new action to recover damages which he claimed to have suffered subsequent to the date of the award. He alleged that the defendant had wrongfully kept the aperture open subsequent to the award, in consequence of which the water from the defendant's mine had constantly flowed into his, to his great damage, and that the defendant should therefore be required to make his loss good. The court held that the flowing of the water and the damage thereby caused to the plaintiff was merely consequential to the making of the aperture, and, as the plaintiff had already received compensation for that, he had no ground of action. The court, it is true, said also that the defendant, for making an excavation and aperture in the plaintiff's land, was liable to an action of trespass, but that no cause of action arose from his omitting to re-enter the plaintiff's land and fill up the excavation. Such an omission, it was held, was neither a continuation of the trespass, nor of a nuisance, nor a breach of a legal duty. But this, it must be remembered, was said in a case where the court found that the plaintiff's damages, both immediate and consequential, had been judicially ascertained and paid by the wrongdoer and accepted by the person injured. That case did not stand as this does, where the injured person is before the court, with his wrongs wholly unredressed, asking for such remedy as will give him adequate protection against the consequences of an unlawful invasion of his rights. All the complainants ask is protection against the injurious consequences which will inevitably result from what the defendants avow they mean to do.

The duty of the court is plain. The law is settled. In a case substantially identical in all its material facts, the chancellor extended protection to the aggrieved party by injunction: *Thomas Iron Co. v. Allentown Mining Co.*, 1 Stew. Eq. 77. In that case, as here, an opening had been made from the defendants' mine into the complainants', unlawfully, and there, as here, the defendants threatened to remove the pillars and other supports and let their mine fill with water. The chancellor held that inasmuch as the defendants had made an opening into the complainants' mine it was no stretch of authority to prohibit them from such use of their property as would inflict damage on the complainants' property. He also declared that even if the complainants had themselves made the opening between the two mines it would still have been the duty of the court to have protected the complainants against the ruinous consequences necessarily resulting from the removal of the supports of the defendants' mine, and that the maxim *sic utere tuo ut alienum non laedas*, would, under such a state of facts, have furnished sufficient ground for such relief. It appeared in that case as it does in this, that if the defendants' mine should be flooded, the complainants' mine would be utterly destroyed. The chancellor said, in view of this fact, that the court should not hesitate to restrain a trespasser from an act which would inflict such an injury on the property on which he had trespassed. What the defendants propose to do is, not to work their mine—that they may unquestionably do without regard to the consequences to the adjoining mine so long as they do their work in a skillful, reasonable and proper manner—but what they propose to do is to destroy their mine; and it is certain if they are permitted to destroy their mine they will also destroy that of the complainants. This fact, in my judgment, makes the duty of the court perfectly plain.

The complainants are entitled to an injunction restraining the defendants from removing the pillars, walls and other supports of their mine to such an extent as to endanger the caving in of the surface.

The complainants' right to the other measure of relief they ask is not so clear, on the facts now before the court, as to make the path of duty plain. They ask an injunction re-

straining the defendants from permitting water to flow from their mine into the complainants' mine through the two apertures. Though they pray that relief be granted to them by simple prohibition, yet it is obvious that if the relief they ask be given to them, it must be mandatory in its character. The defendants can not prevent the water from flowing through the two apertures except by building bulk-heads or some other barrier, or by pumping. The injunction, to accomplish its purpose, must command or coerce the defendants to do certain affirmative acts, not merely to remain inactive or refrain. Injunctions of this nature are rarely granted before final hearing, or before the parties have had a full opportunity to present all the facts of the case in such manner as will enable the court to see and judge what the truth is. They are always granted cautiously, and are strictly confined to cases where the remedy at law is plainly inadequate. In the present condition of the case, it is impossible to say that the complainants' injuries, resulting from the flow of the water through these apertures, will be of such a character as to entitle them to relief in this form. The affidavit made by the complainants' mining engineer, states that these apertures afford a free entry into the complainants' mine for the water of the defendants' mine, and that if the pumps in the defendants' mine were to be stopped, the water would probably drown the complainants' mine; but this, it will be observed, is a mere opinion. No facts are given; we are not even told the carrying capacity of the apertures, nor how much water is now passing through them daily from the one mine into the other. Besides, the superintendent of the complainants' mine says, in his affidavit, that, owing to the seamy character of the wall between the two mines, no bulk-head that could be built at the apertures would give effectual protection to the complainants, for the percolation through the walls would throw into the complainants' mine such a large quantity of water as to do them very serious damage. But the defendants are not answerable for any injury the complainants may suffer from percolation. That is the work of nature, and any loss they sustain from that cause they must bear as one of the disadvantages naturally incident to the location of their mine. Now, in this condition of the proofs, it is, I think, obviously impossible to form any-

thing like a just judgment as to how much of the water, in case the complainants' mine should be submerged, would flow through the walls, and how much would flow through the apertures. It should also be stated, in this connection, that the superintendent of the defendants' mine swears that half the water in the defendants' mine is thrown there by the complainants. The complainants certainly are not entitled to protection against water which, rising in their mine, is thrown by them into the defendants' mine and then flows back. As the case now stands, I am not convinced that the injury, of which the complainants complain, is of a character to entitle them to a preliminary injunction, or that the defendants are responsible for it. The second branch of the relief asked by the complainants must therefore be denied.

JONES ET AL. V. ROBERTSON.

(116 Illinois, 543. Supreme Court, 1886.)

Each owner must protect himself. One of the experts testified: "It is customary to make a dam whenever necessary. The rule all work by is for each person to protect his own mine against others,"—and the opinion of the court seems to adopt this language as correctly stating the rule.

¹Each owner of adjoining coal land has the right to take out all his coal, i. e., to work up to his boundary line.

If the owner below would protect himself he must leave his own coal for barrier.

²The upper owner may bulk-head, using ordinary care and skill, and will not be liable for the consequences of an ultimate break and flood.

The owner above may quit at will and let the water go to his underlying adjoiner.

An upper owner may dam against water, the "common enemy," only he may not gather water which, but for such means, would never have come to the mine below.

A bulk-head not a nuisance. Defendant built a dam in due course of mining, and after two years let the ground to tenants, who continued in possession until it gave way some two years later. Defendant could not be liable unless the dam were a nuisance *per se* at the outstart, and that it was such nuisance the court refused to hold.

¹ *Shaffo v. Johnson*, 15 M. R. 262; *Lord v. Carbon Co.*, 15 M. R. 695.

² *West Cumberland Co. v. Kenyon*, 15 M. R. 203.

Error to the Appellate Court for the Fourth District; heard in that court on error to the Circuit Court of Madison County, Hon. WILLIAM H. SNYDER, J., presiding.

Defendant owned mines on the rise, against the water in some of which he had built a bulk-head, which after some years gave way and flooded plaintiffs' mine below. Plaintiffs had so worked their own mine as to leave no barrier, and had even worked across their line.

All the facts in detail are recited in the opinion of the court.

BAKER & BAKER and JOHN F. MCGINNIS, for plaintiffs in error.

GEORGE F. McNULTY and WISE & DAVIS, for defendant in error.

Mr. Chief Justice MULKEY delivered the opinion of the court.

On the 15th day of June, 1881, the plaintiffs in error brought an action on the case in the Madison Circuit Court against the defendant in error, for an alleged injury to certain coal mines belonging to the plaintiffs. There was a trial before the court and a jury upon issues of fact, resulting in a verdict and judgment for the defendant, which was subsequently affirmed by the Appellate Court for the Fourth District. Counsel for plaintiffs make no complaint in the argument filed of the rulings of the circuit court upon questions of evidence, but ask a reversal solely on the ground the jury were not properly instructed on the trial as to the law of the case.

The record discloses substantially the following state of facts: The plaintiffs and defendant, before and at the time of the alleged injury, were engaged in mining coal from their respective lands, which lie contiguous to each other, and their several parcels constituted a part of a large body of coal lands lying near North Alton, belonging to various coal operators, and known as the "coal branch." The lot of land belonging to the plaintiffs contains twenty acres, and lies in the extreme north-east corner of the coal branch, and is bounded on the south by

the defendant's land. The tract of the defendant contains seventy-eight and one half acres, and in part lies immediately south of the plaintiffs' tract, but being much wider than theirs it extends considerably farther west. The coal branch mines all "dip" from the southwest to the northeast, so that upon the removal of the coal from any of them, the water accumulating therein would, if unobstructed, naturally flow into the plaintiffs' mines. Prior to the injury complained of the plaintiffs had sunk two shafts on their land, one about the center and the other near the dividing line between them and the defendant. The two mines of the plaintiffs were, as seems to have been the custom, connected so as to afford a passage from one mine to the other. Most of the coal properly belonging to the south mine had been removed before the present controversy arose. In drifting south the plaintiffs, presumably by mistake, had crossed the line between them and the defendant at the northeast corner of the land of the latter, and had removed the coal for a distance of some ninety-five feet, by means of which mine No. 1. of plaintiffs and No. 7 of the defendant were connected. Mine No. 7 was also connected with another mine of the defendant, a short distance in a southwest direction from the latter, known as mine No. 6. Those two mines were originally dry, and were both worked at the same time. In drifting west in No. 6 the defendant broke into No. 5, an old abandoned mine of his. West and northwest of No. 5 is an extensive area of territory, consisting of old, abandoned mines belonging to various parties, all of which, in process of mining, had become connected, so that the water in most of them, which had been accumulating for years, was constantly pressing down and forcing its way toward the mines of the plaintiffs and the defendant; yet its progress was arrested at mine No. 5 of the defendant so long as that remained unconnected with the mines below it. When, however, No. 5 became connected with No. 6, as heretofore stated, the water at once commenced making its way through No. 5 into No. 6, and so continued until about a year afterward, when the defendant found himself unable to control the water, which was rapidly forcing its way into No. 6.

The usual method which prevailed at the coal branch, of

getting rid of water in the mines was to collect it in a sump or basin excavated near the mouth of the pit, and hoist it to the top of the shaft in barrels. When, however, the accumulations became so great that the water could not be disposed of in that way, except at a cost that would not pay to take out the coal, it was the custom or usage, under such circumstances, for the owner of the mine to protect himself from the aggressions of the water as best he could by the erection of a dam or other like means. Thus, Walton Rutledge, a surveyor and mining engineer, and one of plaintiffs' own witnesses, testifies: "It is customary to make a dam whenever necessary. The rule all work by is for each person to protect his own mine against water." The defendant being no longer able to control the water in No. 6, as above stated, was forced to abandon it. But with a view of preventing the water, which he could no longer control, from forcing its way into No. 7, and driving him out of that also, he determined to build a strong dam between No. 6 and No. 7, so as to confine the water in No. 6, which he accordingly did, and thereupon abandoned No. 6 altogether. Had this not been done it is clear the water would have not only destroyed the defendant's remaining mine, No. 7, but would have passed on through that into the plaintiffs', and thus have destroyed all of them long before the alleged injury occurred, unless the plaintiffs had adopted similar measures for their own protection by building a like dam between their own mines. Some four years after the building of the dam by the defendant, during which time it protected, as we have just seen, the plaintiffs' and defendant's mines alike, it finally, by reason of the constantly increasing pressure, gave way, when the long pent-up waters poured down through mine No. 7 of the defendant into the mines of the plaintiffs, overflowing and submerging them in water. The plaintiffs in the present action seek to recover from the defendant damages alleged to have resulted from the breaking of the dam, and the consequent flooding of their mines.

It further appears that some two years before the breaking of the dam, to wit, on the 25th of March, 1874, the defendant leased his entire mines for a period of ten years, commencing on that day and ending on the 25th of March, 1884, to Thomas Hamilton and Thomas Cunningham, who at once took posses-

sion and control of the mines under their lease and so continued in possession and control of the same up to the time of the breaking of the dam. That the dam, when built, was sufficiently strong and properly constructed, is not only settled by the finding of the appellate court, but is conclusively shown by the fact that it effectually withstood the constantly increasing pressure of the accumulating waters for some two years after the leasing of the mines, making about four years altogether from the time it was built.

Under this state of facts the plaintiffs asked the court to give the jury the following instruction, which the court refused to do and the plaintiffs excepted.

“If the jury believe, from the evidence, that there was a dam erected in one of the main leads or ways of the coal mine of the defendant, either by the defendant or his lessee, by and with his knowledge and consent, and that by reason of such dam being erected the natural and ordinary flow of the water percolating and flowing through said mine was checked, and thereby accumulated in the mine of said defendant in a large and unusual quantity back of, and behind said dam, whereby said dam broke and gave way, and precipitated with an irresistible force a large and unusual quantity of water in and upon the mine of the plaintiffs and drowned out and destroyed the same, then the jury must find for the plaintiffs.”

We agree with counsel for plaintiffs in error that this instruction fairly presents the legal theory upon which the plaintiffs must recover if they can recover at all. On the other hand, if the instruction can not be sustained on legal principles the judgment is proper, and should not be disturbed, even conceding some of the instructions for the defendant in error are not technically accurate.

It was contended by the plaintiffs on the trial below, that the defendant was guilty of negligence in operating his mines in such a manner as to connect them with the old abandoned mines lying west and northwest of his own, by means of which, as we have seen, the amount of water flowing into mine No. 6 was so increased as to become uncontrollable by the ordinary method of collecting it in a sump and hoisting it in barrels to the top of the shaft. It was also contended that notwithstanding this increase of water the defendant, by the exercise of reason-

able care and diligence, might have hoisted it to the top of the mine in the manner stated and that hence there was no necessity for building the dam. It was further contended that the dam was not made sufficiently strong at the outset, and that there was also negligence in not keeping it in repair. There was, moreover, a sharp conflict in the evidence as to what was the custom or usage at the mines respecting these matters, and also as to whether the defendant had conformed to such usage or custom. The refused instruction, however, ignores all these issues of fact which were submitted to the jury, and declares, as matter of law, that in order to entitle the plaintiffs to recover it is only necessary for them to show the building of the dam by the defendant, the accumulation of water behind it, and its subsequently giving way and flooding the plaintiffs' mines. If such be the law, much labor and time might have been saved by excluding all evidence offered on those issues, with the exception just stated.

We are clearly of opinion the instruction in question was properly refused. The reasons which led to this conclusion may be stated very briefly.

The case in hand, modified somewhat by special circumstances, is in most of its essential features like many others to be found in the books. It is a controversy between owners of adjacent mines, where, as is usually the case, the mine of the defendant is upon a higher plane than that of the plaintiffs, and the complaint is, that waters improperly pent up in the defendant's mine have escaped and flooded that of the plaintiffs. The question then arises: what are the mutual rights and duties of the owners of adjacent mines thus situated? The answer to this question will present the general view which we entertain of the law as applicable to this case and the one which we think is fully sustained by the authorities. We understand that each owner of mines thus situated has the right to take out *all the coal* within the limits of his own boundaries: that is, each may work to the dividing line in every direction, but of course can not cross it without becoming a trespasser. While this is so, common prudence and self-interest would say, the owner of the lower mine, when danger from water is apprehended, as is generally the case, should not work up to the dividing line between himself and the

upper owner, but should leave a wall of coal within his own boundaries, of sufficient width and strength to protect him from the encroachments of the water from the upper mine, which, if unobstructed, would necessarily flow into his own. Where there is a mining district consisting of numerous connecting mines, and those at the upper part of the dip, or on the higher level, have been mined and abandoned, it is clear the waters gathering and percolating through them will, by force of the law of gravitation, be thrown in a body upon the first mine below which is being worked, in which case, if the owner is not able to protect himself from the water thus concentrated by the ordinary methods of pumping or hoisting it to the top of the shaft in barrels, it is manifest he must either abandon the mine altogether, or resort to some other more efficacious means to prevent a loss of his property. Such is exactly the case here.

The question then arises: what duties does the owner of the mine having this increased burden and peril cast upon it, owe to the proprietor of the one immediately below him, where such proprietor has failed to take any precautionary steps for his own protection, as was the case here? If the upper proprietor is unable to profitably work his mine without building a dam across the way leading into it from above, may he do so, or must he abandon his own mine altogether rather than incur the risk of the dam ultimately giving way and precipitating the water thus accumulated in undue quantities, upon himself and the owner below, before the latter has been able to take out all of his coal? Under the circumstances stated we do not understand the law requires the owner of the upper mine to so abandon his property in order to avoid such a contingency as that suggested. On the contrary we are of opinion he has the right to build the dam, and if in doing so he exercises ordinary care and skill, he will not be held liable for the consequences, should it subsequently give way without his fault. While it is customary for the owners of mines to keep them as free from water as practicable, yet they are not bound by law to do so. The only obligation resting upon them in such respect is that of self-interest. The upper owner may abandon his own mine whenever he pleases, notwithstanding his doing so may largely increase the flow of

water into the mine below, and thereby greatly enhance the labor and expense of the owner in operating it. So the owner of a mine, for the purpose of protecting himself from the encroachments of water, which is regarded as the "common enemy" of mines and mining interests, may erect a dam or any other structure on his own premises, if necessary for such purpose, subject to the limitation that such dam or other structure does not have the effect to collect water from adjacent territory and eventually cast it upon a lower mine, which but for such dam or other structure would not have reached it.

There is another consideration which, in our judgment, forbids a recovery in this case. Two years before the breaking of the dam, as has already been seen, the defendant leased the mines to others, who took immediate possession of the same, and continued in possession up to the time the dam gave way, and there is not the slightest ground for the claim that the defendant is liable for the consequences of the dam's ultimate failure, unless the position assumed by the refused instruction can be maintained, namely, that its construction at the outset was *per se* a nuisance, which we are satisfied, as already indicated, is not the law. We hold the building of the dam was a lawful act, clearly justified by the circumstances under which it was built. When built it fully answered the purpose for which it was constructed, and so continued long after the defendant had leased the mines. It successfully resisted the constantly increasing pressure resulting from the daily accumulation of the water, for about four years, protecting the mines of the plaintiffs and defendant alike. The general view here taken is fully sustained by the following authorities: Gould on Waters, 294; Bainbridge on Mines (1st Am. Ed, from 3d Gould's Ed.), 394; *Acton v. Blundell*, 12 M. & W. 324; *Smith v. Kenrick*, 7 Com. B. 515; *Baird v. Williamson*, 15 Id. 376; *Everett v. Hydraulic Flume Co.*, 23 Cal. 225; Leading Cases on Mines and Mining, 629.

The judgment will be affirmed.

Judgment affirmed.

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11. *Facts of the case—Conflicting claims.*—A, having made application for patent, was adversely by B. On trial of suit supporting adverse it was disclosed that B had covenanted with C to give him a "good and sufficient deed," and C was in possession under the executory contract containing this covenant. B was non-suited on the ground that he was not in possession: *Held*, that such ruling was error. That there being privity between the adverse claimant and the person in possession, the technical want of possession in plaintiff did not defeat his right to have the title adjudicated by a verdict of the jury upon the respective claims of the applying and adverse claims. *Id.*

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16. *Only citizens of the United States* and persons who have declared their intentions to become such, can acquire rights by location upon mineral lands of the public domain. *Id.*

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ADVERSE POSSESSION.

1. *Adverse user of water gives title.*—The use of water in any particular way for a period corresponding to the time limited by statute within which an action must be commenced to determine the right to it, raises a presumption of title to the same in the person enjoying the same as against a right in any other person, which might have been but was not asserted; but in order that this presumption of title may be conclusive the right to the use of the water must have been asserted under a claim of title to the knowledge of the person having a prior right, and must have been uninterrupted. *American Co. v. Bradford*, 190

2. *Burden of proving right to water by adverse use.*—The burden of proving an adverse, uninterrupted use of water for five years, to the knowledge of the person having a prior right, is on the party claiming it; and if he leave it doubtful whether the use was adverse, known to the owner and uninterrupted, it is not conclusive in his favor. *Id.*

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1. *Citizenship must be pleaded and found.*—In an action between claimants to determine the right of possession to a mining claim, the plaintiffs must allege and show all the qualifications necessary to entitle them to purchase, among which must be included an allegation that they are citizens, or have declared their intention to become such; and, when the action is tried to the court alone, all these facts must be found, whether admitted by the pleadings or not. *Rosenthal v. Ives*, 324

2. *As there was an omission to find in these cases that plaintiffs were citizens*, or had declared their intention to become such, *held*, that the judgment should be reversed, and the causes remanded, with directions to the court below to find on this question, from the evidence taken at the trial, if sufficient, and if not, upon such evidence as may be adduced, and proceed to render judgment accordingly. *Id.*

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AMENDMENT.

1. *Amendment of pleadings after hearing.*—Where an objection to the relevancy or competency of the testimony is made specific for the first time in the closing argument for the complainant in an equity case, the court will permit the defendant to so amend his pleadings as to obviate the objection, where the testimony is before the court showing a proper case therefor. *Hamilton v. Southern Nevada Co.*, 315

ANNUAL LABOR.

1. *Failure to do annual labor need not be specially pleaded in adverse claim suit.*—In ejectment, to recover mining ground, if the defendant relies upon a forfeiture by plaintiff for failure to comply with the local rules, such forfeiture must be specially pleaded; but in an action to determine conflicting rights to mining claims, which may be brought by the plaintiff, whether in or out of possession, each party must prove his claim to the premises in dispute, and proof of forfeiture may be given, though not specially pleaded. *Steel v. Gold Lead M. Co.*, 292

2. *By statute, prima facie proof of annual labor may be made by affidavit* filed within six months after the annual period has expired; construed, to allow such filing within the annual period. *McGinnis v. Egbert*, 329

3. *The annual labor affidavit may embrace more than one claim.* *Id.*

4. *If the work is resumed* on a claim after it has been open to re-location, but before re-location is actually made, the rights of the original locator stand as if there had been no failure. *Id.*

5. *Annual Labor Act of 1880.*—The congressional act of January 22, 1880, fixed the first day of January as the commencement of the annual period for all unpatented claims then existing. The act took effect from the date of its passage. The object of this amendment of the law was to render the annual periods uniform as to all mining claims, and the exemp-

ANNUAL LABOR. *Continued.*

tion of claims from the performance of labor for a portion of the year in certain cases was a necessary result of the amendment. *Id.*

6. *Performance of the specified amount of labor annually is a condition* which must be complied with, and failure on the part of a locator to perform such work will forfeit his right to hold such claim. *Du Prat v. James*, 341

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9. *Failure to do annual labor must be specially pleaded.*—In ejectment to recover a mining claim it is sufficient for the claimant to show a valid location. He need not also set out that he has done the work necessary to represent the claim; the failure to do such work should be shown by the other party. The grant evidenced by a valid location continues operative to protect the ground from a subsequent location, until the title thereby acquired has become forfeited by a failure to do the necessary work or otherwise; and such matters of forfeiture, by which the claim is to be defeated, must be specially pleaded. *Renshaw v. Switzer*, 345

10. *Re-entry by original claimant before re-location complete.*—Defendant's claim became open to re-location January 1, 1886, and at 1 A. M. plaintiff posted his notice. He did not, however, mark his boundaries until January 5th, and defendant, on January 1st, at the usual hour in the morning, resumed labor, did work to the amount of \$10 up to January 5th, and \$200 during that year: *Held*, plaintiff's proceedings, not amounting to location before work was resumed, conferred no right upon him. *Pharis v. Muldoon*, 348

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APEX.

1. *Claimant must show apex.*—Plaintiff's location and defendant's location are some distance apart, and they overlap so that the north end of plaintiff's location is nearly parallel to defendant's location for about the distance of 750 feet. In asserting a right to follow a vein or lode on its dip beyond his own location and into that of defendants, plaintiff must show the outcrop or apex of such vein or lode to be in his own location throughout the ground in controversy, being the extent of the locations parallel to each other. *Hyman v. Wheeler*, 519

2. *Side lines must include apex—End lines must be parallel.*—Only those veins can be followed on the dip whose apexes are within the surface lines and within the area found by extending down vertical planes through end lines which must be parallel. *Iron Silver Co. v. Elgin Co.*, 641

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2. *The object of an assay is to give the true value of the ore, and the assay called for in the contract may be shown to be erroneous by assays otherwise taken, and by the clean-up. Id.*

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3. *Mutuality is essential to a contract*; if no basis appears upon which one who has taken a lease can charge others with its obligations, the latter can not charge him with having taken it in the common interest and claim rights under it. *Pierce v. Pierce*, 675

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faith or an abuse of discretion with intent to defeat the happening of that event, and thus to defraud the plaintiff of his rights under the contract. *Id.*

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3. *P., a principal stockholder of the defendant corporation*, after consultation with the president, entered into a written contract with plaintiff for the purchase of certain lands. It was signed with the corporate name "by ———, President, by P." It called for a cash installment, which was paid by P., who was after reimbursed by the board; the defendant took possession and sank several prospect wells for coal; not finding the vein of coal as thick as expected it declined to make the further payments: *Held*, that whether or not P. had authority to bind the corporation by signing the contract, it had accepted such contract and was liable for the purchase money. *Id.*

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1. *An upper owner may dam against water, the "common enemy,"* only he may not gather water which, but for such means, would never have come to the mine below. *Jones v. Robertson*, 703

2. *A bulk-head not a nuisance.*—Defendant built a dam in due course of mining, and after two years let the ground to tenants, who continued in possession until it gave way some two years later. Defendant could not be liable unless the dam were a nuisance *per se* at the outstart, and that it was such nuisance the court refused to hold. *Id.*

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1. *A default at time of final judgment* against co-defendants who fail to plead, is not ill-taken nor too late. *Pardee v. Murray*, 515

2. *A default at time of final judgment* against co-defendants who fail to plead is not ill-taken at such time. *Manville v. Parks*, 566

DESCRIPTION.

1. *Uncertainty in description.*—A deed containing the following description: "All my interest in real estate, easements and rights to dig and mine coal in Mahoning county, Ohio, conveyed to me, and now owned, held and enjoyed by me from William Buchanan," is sufficiently certain as to intention, and parol evidence will be admitted to identify the property. *Stambaugh v. Smith*, 82

2. *Identification of patented premises.*—It is only after the entire description in a patent has been considered, and found so inaccurate as to render the identity of the grant wholly uncertain, that the grant is to be held void. *Cullacott v. Cash Co.*, 392

3. *Sufficiency of description in notice.*—A notice of location of a mining claim distinctly marked upon the ground, describing the west-end corners as marked by pine trees, while it appears that they were in reality marked by stakes, the notice, however, referring to a permanent monument, to wit, "the Gambetta lode claim on the east," contains a sufficient description. *Upton v. Larkin*, 404

4. *Description required by statute.*—The Federal and the State law are substantially the same in requiring that the location certificate of a mining claim must contain such a description as will identify the claim with reasonable certainty. *Drummond v. Long*, 510

DEVISE.

1. *Construction on cross-remainders—The half blood excluded.*—The testator, after devising to his wife one third of the net proceeds of certain real estate during her natural life, devised to his son and daughter all real estate not otherwise devised, and directed that in case of the death of either of the children before attaining the age of twenty-one years, without lawful issue, the said real estate should go to the survivor. The daughter died *first*, in her minority and without issue, and the son afterward died, also in his minority and without issue: *Held*, That there being cross-remainders in fee, on the death of the sister the brother took her share, not as *her heir* at law, but under the will of the testator; and on the death of the son without issue, the *half* brothers and sisters of the testator could not take from the son, because they were not of the blood of the ancestor, the testator. But the children of a deceased sister of the *whole* blood of the testator took the estate on the death of the son. *Irwin v. Corode*, 120

DIP.

1. *Admissions as to supposed course or dip of an undeveloped lode are mere matters of speculation, and are not (estopping) evidence.* *Pardee v. Murray*, 515

2. *Possession of the surface gives (constructively) possession of all veins apexing within the surface lines, including such parts of veins as extend on the dip beyond such lines.* *Id.*

DISCOVERY.

1. *Sufficient instruction as to discovery.*—An instruction that "to make a valid location of a lode mining claim, there must be a discovery within the limits of the claim, of a vein * * * containing gold, silver, or other valuable mineral deposits, * * *" is proper, when taken in connection with other instructions defining and limiting what is meant by a "discovery." *Upton v. Larkin*, 404

2. *Discovery and appropriation are recognized as sources of title to mining claims; and development by working as the condition of continued ownership, until a patent is obtained.* *Erhardt v. Boaro*, 473

3. *Prospector protected pending complete location.*—Whenever preliminary work is required to define and fix a located mineral claim, the law protects the first discoverer in the possession of the claim, until excavations and development can be made, sufficient to disclose whether a vein or deposit exists of such richness as to justify work to extract the metal. *Id.*

4. *Discovery and discovery shaft distinguished.*—If the re-locator finds a vein in the discovery shaft of the abandoned claim, he may, under our statute, make a valid re-location thereon, though technically such finding may not constitute a discovery. *Armstrong v. Lower*, 631

See LOCATION NOTICE, 1; PLACERS, 7.

DISCOVERY SHAFT.

1. *Where the position of a discovery becomes material, as to whether made on or off patented ground, it is for the proper party to prove where it was made and the answering party afterward to show, if they*

DISCOVERY SHAFT. *Continued.*

can, that it is on such ground; the examination should not be interrupted to prove at that stage the existence of the patent. *Upton v. Larkin*, 404

2. *Discovery shaft on the line* of an elder claim, and thus partly on and partly off clear ground, will sustain a location. *Id.*

3. *Patenting the discovery shaft to third party.*—The Cambrian lode was discovered in 1878, prior to the Mendota, but it had allowed that part of its location which included the discovery shaft to be covered by the patent applied for and issued to a third location: *Held*, that the Cambrian had by such fact no further validity as a mining location. *Gwillim v. Donnellan*, 482

4. *The patenting of the ground of a claim which includes its discovery shaft* to an adverse location avoids the entire claim. *Id.*

5. *Discovery shaft must be on public domain.*—The locator of a mining claim must sink a discovery shaft upon territory which he has a right to appropriate. He can not sink such shaft upon ground embraced within a prior valid and subsisting location. *Armstrong v. Lower*, 631

DITCHES.

1. *Grant of right of way to ditches.*—The act of Congress of July 26, 1866, clearly grants the right of way over the public land to all who may desire to construct ditches or canals for mining or agricultural purposes—after allowing for the solecisms usually found in the acts of that body. *Hobart v. Ford*, 236

See PATENT, 1.

DOWER—See WASTE, 3.

EJECTMENT.

1. *Findings on admitted facts—Ouster.*—Where, in ejectment, the answer admits ouster, it is erroneous for the court to instruct the jury that ouster was one of the issues to be tried, and that they must find thereon. *Taylor v. Middleton*, 284

2. *Recovery by single co-tenant.*—A tenant in common has exclusive possession, and may treat the common property as his own against all the world, except his co-tenants. *Hopkins v. Noyes*, 287

3. *Ouster.*—An applicant for patent can not rely on trial on want of proof of an ouster. *Wolverton v. Nichols*, 309

4. *Averment of title in defendant.*—An allegation in the answer of title in the defendant does not present a new issue. It may be proved under a general denial. *Leggatt v. Stewart*, 358

5. *Implied admission of ouster.*—Admission of a deed to plaintiff, followed by an allegation of abandonment by plaintiff and re-entry by [defendant, is an admission of the ouster. *Ketchum v. Barber*, 378

6. *One tenant in common may recover in ejectment* the entire estate of himself and co-tenants. *Erhardt v. Boaro*, 473

7. *Where the claims of title to a mining claim set up by plaintiffs appear to be void in their inception*, plaintiffs have no standing in court to question the validity of defendant's title. *Omar v. Soper*, 497

8. *Title to maintain.*—Generally, any person vested with immediate right of possession can maintain ejectment. As against a trespasser,

EJECTMENT. *Continued.*

prior possession will support the action. As to mining claims, possessory title is sufficient: Rev. St. § 910. *Aurora Hill Co. v. 85 M. Co.*, 581

9. *Title to known lodes remains in United States.*—The title remaining in the United States in the veins thus known to exist and not claimed or referred to in the patent, the patentee and his grantee have no right to dispossess any one in the peaceable possession of such veins whether the latter have any title or not. *Reynolds v. Iron Silver Co.*, 591

10. *Idem*—*Plaintiff must prove affirmative title.*—In such case the rule which applies to actions of ejectment, and to all actions to recover possession of real estate, applies, namely, that the plaintiff can only recover on the strength of his own title and not on the weakness of defendant's title. *Id.*

See ADVERSE CLAIM, 8; INJUNCTION, 6.

EMINENT DOMAIN.

1. *Eminent domain not involved.*—Under the act of Congress granting the right of way over the public land for the construction of ditches, there is no question of taking land for public uses involved, the government having absolute control over its own land. *Hobart v. Ford*, 226

ESTOPPEL.

1. *Parol agreement as to boundaries.*—In ejectment for a mining claim, where there is evidence tending to show an adjustment of boundaries between the parties by oral agreement, an instruction that if, under the oral agreement, improvements were made by one of the parties, this would work an estoppel, is erroneous, when there is no evidence that any such improvements had been made. *Garthe v. Hart*, 492

EVIDENCE.

1. *Existence of coal beds, how proved.*—For the purpose of proving the existence, quantity and quality of coal on certain premises, it is competent to show that coal seams of a certain thickness and quality exist on other lands in the vicinity, and the opinions of geological experts that coal of similar quantity and quality exist on the premises in question. *Stambaugh v. Smith*, 82

2. *The political and social condition of a country* are matters for the judicial cognizance of its courts. *Irwin v. Phillips*, 178

3. *Proof of contemporaneous understanding* allowed to aid the construction of terms of art whose meaning is contested. *Lewis v. Fothergill*, 272

4. *The general objection "irrelevant and incompetent,"* made before the master in an equity case, is not sufficiently specific to be entitled to consideration upon the hearing. *Hamilton v. Southern Nevada Co.*, 315

5. *Record of another action admissible as against a party.*—Where one of the defendants in action has been a plaintiff in another action in which his claim was opposed to his claim in the case at bar, the complaint, order of court, and affidavits offered on behalf of plaintiff, are admissible as admissions of said defendant, as against him, but against none of his co-defendants. *Hyman v. Wheeler*, 519

See ADMISSIONS.

EXCEPTION.

1. *Exception in covenant strictly construed.*—The exception in the covenant, "that the said premises are free from all incumbrances whatsoever, except a claim which J. W. has on said land for iron ore," can not be extended beyond the plain and ordinary meaning of the words, and will not be construed to except the entire claim of J. W. under a deed which has been a matter of public record for many years and which includes both iron ore and coal, with the further privilege of roads. *Stambaugh v. Smith*, 82
2. *The coal privileges and right of way are incumbrances within the meaning of the covenant.* *Id.*
3. *Void exception.*—If land be leased in which there is a hidden mine, and the lessee opens it and then assigns his term with an exception of the profits of the mines, or the mines themselves, or of the timber, trees, etc., such exception is void. *Saunders' Case*, 109

EXECUTION.

1. *Judicial sale—Title of purchaser.*—The purchaser at a judicial sale acquires only the present interest of the judgment debtor. No after-acquired title is affected by such a sale. The sheriff's deed can, at most, only have the operation of a quit claim deed in the strictest sense. *Hamilton v. Southern Nevada Co.*, 315
See ADVERSE CLAIM, 13.

EXECUTORS.

1. *Practice—Suit against executor.*—In an action against the executor of an estate it must appear that the executor had rejected the plaintiff's claim before suit, but the statute does not require the indorsement of such rejection upon the claim nor a specific demand for an indorsement of its allowance. *Stambaugh v. Smith*, 82
2. *An executor can not be charged, as such, with acts of waste done under another capacity.* *Lynn's App.*, 126
See INTEREST, 1; WASTE, 1.

EXHAUSTED MINE.

1. *Covenant compelling exhaustion regardless of surface support.*—Although it is an established rule that where there is a severance of the minerals and the surface, the owner of each must use his own with reference to the other, upon the maxim *sic utere tuo ut alienum non laedas*, still the terms of a lease of a seam of coal may be such as by necessary implication to allow the lessee to get all the minerals without leaving support for the surface. *Shafto v. Johnson*, 262
2. *Payment out of profits—Contract making workability to a profit a matter for the purchaser's individual judgment.*—Plaintiff sold to defendant his interest in a lease on a slate quarry for a small installment in cash, the balance to be paid out of the profits, with clause allowing purchasers to abandon it if they made no profits and in their estimation further working would not be profitable. After considerable expenditure the purchasers did abandon: *Held*, that their right to abandon was absolute on their making no profit, and their own belief that the adventure could not be further worked to a profit, and was not dependent upon the opin-

EXHAUSTED MINE. *Continued.*

ion of witnesses that they might have worked to a profit. *Krum v. Mersher*, 415

3. *Plea of exhausted mine or mineral non-existent.*—In a five-year ore lease, the lessees covenanted to pay 35 cents per ton for every ton of merchantable ore mined, and to mine at least 1,500 tons annually during the term, or in default thereof to pay a royalty of \$525 annually, and that the lease should be forfeited at the option of the lessors, if at the end of each year at least \$525 as rent or royalty had not been paid. In an action of covenant to recover unpaid royalties for two years under the default rate, an affidavit of defense was filed, averring that though the defendants had operated the mines in a workmanlike and skillful manner for about nine months, yet on account of the non-existence of sufficient ore and its inferior and unmerchantable quality, they were unable to continue: *Held*, that the affidavit exhibited a good defense to the action. *Muhlenberg v. Henning*, 423

4. *Where no ore found, no roya'ty due.*—A lease "for the purpose of exploring for, mining, taking out and removing the merchantable ore, which is or which hereafter may be found on, in or under said land," reserving surface use to the lessor, is a lease for mining iron ore. And if after diligent search no ore is found, the lessees can not be held for royalty—notwithstanding a covenant to take out a fixed quantity. *Gibben v. Atkinson*, 428

See CONSIDERATION, 1; TENANT FOR LIFE, 6.

FLOODING.

1. *Discharge of water into neighboring mine by bore-hole.*—Defendants, the owners of a mining property, sank a shaft by which they tapped the water which had formerly found its way into certain old workings on their own ground, and had thence percolated into the plaintiff's mines. The defendants then made a bore-hole at the bottom of the shaft. It was admitted that the making it was not in due course of mining, but only for the purpose of getting rid of the water. The effect of the bore-hole was to let off the water into the above mentioned old workings on the defendant's ground, whence it percolated into the plaintiff's works in the same way in which it would have done if neither shaft nor bore-hole had ever been made: *Held*, that the defendants had not, by making the shaft, so appropriated the water as to lay themselves under an obligation to keep it from coming upon the plaintiff's land, and that, as the effect of the defendant's operations was not to throw upon the plaintiff's land any burden which it had not borne before, the plaintiff's case failed. *West Cumberland Co. v. Kenyon*, 203

2. *Land on a lower level is under a natural servitude* to that located above it, to receive the water flowing down to it naturally. *Lord v. Carbon Iron Co.*, 695

3. *No remedy for ordinary flow.*—It is a natural right of each of the owners of two adjacent mines, neither being subject to any servitude to the other, to work his own mine in the manner most convenient and beneficial to himself, though the natural consequence may be that some injury will accrue to his neighbor. *Id.*

FLOODING. *Continued.*

4. *The owner above may quit at will* and let the water go to his underlying adjoiner. *Jones v. Robertson*, 703

See DAM, 1, 2; INJUNCTION, 8; WORKINGS, 6, 8.

FLUME—See ADVERSE CLAIM, 5.

FORFEITURE.

1. *Forfeiture to vendor not enforced in equity*.—The failure of the vendee under a contract for the sale of land to pay the purchase price within the time stipulated, or to perform other conditions of the contract, is no ground for a decree in equity declaring a forfeiture of his rights. A court of equity will never enforce a penalty or forfeiture. *McCormick v. Rossi*, 433

See ABANDONMENT, 1.

FRAUD.

1. *Essential elements of remediable misrepresentations*.—In order to rescind a contract for the purchase of real estate on the ground of fraudulent representation of the seller, it must be established by clear and decisive proof that the alleged representation was made in regard to a material fact; that it was false; that the maker knew it was not true; that he made it in order to have it acted on by the other party; and that it was so acted upon by the other party to his damage, and in ignorance of its falsity, and with a reasonable belief that it was true. *Southern Development Co. v. Silva*, 435

2. *Opinion as to ore in sight*.—Statements made by the seller of a speculative property, like a mine, at the time of the contract of sale, concerning his opinion or judgment as to the probable amount of mineral which it contains, or as to the character of the bottom of the ore chamber, or as to the value of the mine, if they turn out to be untrue, are not necessarily such fraudulent representations as will authorize a court of equity to rescind the contract of sale. *Id.*

3. *No presumption that false statement was knowingly made*.—The fact that a representation made by a seller was false raises no presumption that he knew that it was false. *Id.*

4. *Late familiar and confidant not to be lightly charged*.—All presumptions are against fraud; it can not be lightly charged against one in whom implicit confidence has been placed, especially if a near relation; such a person is fairly entitled to a favorable construction of any conduct that is reasonably consistent with integrity, and an accusation that may seriously affect his business reputation should not be held proved by circumstances that are merely ambiguous. *Pierce v. Pierce*, 675

5. *Associate buying into adjoining mine*.—An associate, while managing a mine for the common benefit, took a mining lease to himself on adjoining property; he was not such an agent as one whose entire time is supposed to be paid for: *Held*, that it did not become property in which his associates could claim an equitable interest, and that the mere contiguity of the mine to the subject of his trust did not prevent his making it a matter of private venture. *Id.*

FRAUD. *Continued.*

6. *Any presumption from commingling of accounts* may be explained by the circumstances under which made. *Id.*

See CORPORATION, 4; PARTNERSHIP, 8; PROSPECTING CONTRACT, 4; TRUSTS, 1; VENDOR AND PURCHASER, 1-3.

HUSBAND AND WIFE.

1. *The marital rights of the husband*, in property conveyed to his wife, are only such as regard the rents and profits, and they may be defeated by limiting the grant to her sole and separate use. *Hopkins v. Noyes*, 287

HYDRAULICS.

1. *Irregular flow caused by hydraulics*.—One who enters upon a stream of water above the prior appropriator and erects hydraulic works, must so construct them as not to impede the regularity of the flow of the water, if its irregular flow would injure the first appropriator. *Phoenix Water Co. v. Fletcher*, 185

2. *Injury to prior appropriator, when not actionable*.—A mere temporary or trivial irregularity in the flow of the water, such as does not cause actual injury to the prior appropriator below, will not be actionable; but if a sensible or positive injury be caused, such as would diminish the value of the water right, an action will lie, not only to recover damages, but to enjoin the future commission of the wrong. *Id.*

INJUNCTION.

1. *It is not necessary to stay till waste is actually committed*, where the intention appears and the person insists on his right to do it. *Gibson v. Smith*, 111

2. *Discretion of court as to preliminary injunctions*.—The granting of a preliminary writ of injunction resting very much in the discretion of the court below, the Supreme Court will not be disposed to reverse its action in a case where no answer is filed, and no defense on the merits shown. *Hobart v. Ford*, 236

3. *Injunction to stay waste during suit to determine title*.—Where irreparable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extraction of ores from a mine, it is proper to issue an injunction, though the title be in litigation. *Erhardt v. Boaro*, 447

4. *An appeal does not stay the operation of an injunction*, and its disobedience pending appeal may be punished as for contempt. *Bullion Co. v. Eureka Hill Co.*, 449

5. *But it is suspensive of any acts affirmative in character*.—And possession can not be taken under the terms of an injunction restraining interference with the possession of complainant when complainant is not, in fact, in possession. *Id.*

6. *An injunction can not be made to do the office of ejectment*. *Id.*

7. *Removing pillars in adjoining mine enjoined*.—Equity will restrain one of two adjacent mine owners from removing the supports which prevent the surface of his mine from caving in when it appears that such re-

INJUNCTION. *Continued.*

moval will result in the destruction of his neighbor's mine. *Lord v. Carbon Co.*, 696

8. *A mandatory injunction to prevent flooding*, forcing the defendant either to keep on pumping, or to build, perhaps, impracticable bulk-heads, refused on the facts, although defendant's predecessors in title had themselves got over the line and made the aperture in question. *Id.*

See TUNNEL, 1; WASTE, 2.

INSTROKE.

1. "*Instroke*," is a workmanlike manner of mining—*Irremediable damage not presumed*.—The owner of land agreed to demise the seams of coal under the same to the owners of an adjoining colliery, at a royalty on each ton of coal worked, and at a dead rent of £500 if the royalties did not amount to so much; the dead rent not to be charged for the first three years if the necessary steps were *bona fide* taken, with ordinary dispatch, to win and work the coal. The lease was to contain a covenant by the lessee for working the coal in a proper and workmanlike manner. The lessees proceeded to work the coal by instroke, or heading, from their adjoining colliery, which was situated to the rise of the seams to be demised; the lessor alleged that the lessees ought to sink a pit and work the coal from the deep, and filed a bill to restrain them from working from the adjoining colliery, and to compel payment of the dead rent, on the ground that they had not taken the necessary steps to win and work the coal: *Held*, that working the coal by instroke was working in a proper and workmanlike manner, and that if the lessor had intended to compel the lessees to sink a pit, it should have been provided for in the agreement: *Held*, also, that as the lessees were actually working the coal, irremediable damage would not be presumed. *Lewis v. Fothergill*, 271

2. *A lessee of coal mines may work by instroke* when the lease does not covenant against it. *Id.*

See BARRIERS, 1; WORKINGS, 2.

INTEREST.

1. *Interest* will not be charged against an executor or administrator who pays over to those entitled thereto, within a reasonable time, the funds accruing in his hands. *Lynn's App.*, 126

LACHES.

1. *Account against life tenant*.—After long delay in taking proceedings against tenant for life committing waste, the court endeavors to deal liberally with him, and will charge interest from as late a period as the circumstances can suggest. *Bagot v. Bagot*, 130

LAND OFFICE.

1. *The finding of the land department as to a question of fact*, or a mixed question of law and facts, on a question properly before it, is conclusive on the courts. *Jeffords v. Hine*, 575

2. *Acts of de facto officer*.—A person who is acting as a public officer, with the *indicia* of title, is *de facto* such officer, and his official acts are valid, whether he has the legal right to hold the office or not. *Id.*

3. *Idem*.—A receiver of the land department, acting also as register,

LAND OFFICE. *Continued.*

by authority of an order from the land department, is a *de facto* officer, and his official acts are valid, though it be unlawful for him to hold the office. *Id.*

4. *The decisions of department officers upon questions of law or fact are not subject to collateral attack.* Upon questions of fact their decisions are conclusive upon all parties; upon questions of law their decisions can only be reviewed in a proper case made in a direct proceeding for that purpose. Evidence is not admissible, in an action at law, to show error in the decision of an officer of the land department upon any matter submitted to such officer for his decision. *Aurora Hill Co. v. 85 Co.*, 581

See PATENT, 6.

LEASE.

1. *Expressio unius.*—Provisions in a coal lease for 'protection of certain portions of the surface used *arguendo* as authorizing the destruction of parts of the surface not specially mentioned in such connection. *Shafte v. Johnson*, 262

2. *A mining lease provided for payment of taxes by the lessee; no ore was found and no royalty accrued: Held,* nevertheless, that the lessee was bound to pay the taxes while he occupied the land prospecting for ore, and until surrender of his lease under the option clause. *Gibben v. Atkinson*, 428

3. *Lease distinguished from sale—Lessor entitled to rescission of abandoned lease.*—Articles of agreement were entered into by which plaintiff sold to defendant all the minerals, etc., the second party agreeing to pay a royalty quarterly at so much per ton, with the usual mining rights, the right to remove buildings, etc., but with no covenant to work. Defendant entered, did some little mining, then quit, removed its plant and assumed the position that it was not bound to either surrender or work, claiming ownership of the minerals subject only to royalty when taken at its pleasure: *Held*, that the articles were a lease, that the tenant was bound to work and pay quarterly, and on refusal to either work or surrender, the instrument ought to be rescinded by decree. *Cowan v. Radford Co.*, 453

See EXHAUSTED MINR, 4; INTROKE, 1, 2; SPECIFIC PERFORMANCE, 1; SURFACE SUPPORT, 3; WARRANTY, 18; WEIGHTS AND MEASURES, 3.

LIEN.

1. *Void cancellation of incumbrance.*—An incumbrance upon land in the nature of a coal lease held by McC. in trust for the firm of McC., B. & Co., can not be canceled and annulled by an instrument signed by the firm name, and money paid for such an instrument can not be recovered in an action upon a covenant in a prior deed against incumbrances. *Stambaugh v. Smith*,

See WARRANTY, 6.

LOCATION.

1. *Sufficiency of staking, a jury question.*—The marking of a claim must be such that the boundaries may be readily traced, and whether or

LOCATION. *Continued.*

not the marking conforms to this requirement is a question for the jury.
Taylor v. Middleton, 284

2. *Possession without location.*—Possession of a mining claim, without compliance with the law and the rules of the mining district, gives no valid title or right of possession, and is valueless against a location made and sustained in compliance with the law. *Hopkins v. Noyes*, 287

3. *A miner has no rights beyond the ground actually occupied*, as against other parties prospecting the ground, except by compliance with the statutory requirements concerning location. *Becker v. Pugh*, 304

4. *Staking required by district rules.*—The miners' regulations of Gregory district, adopted in 1860, required the locator to indicate, by stakes or otherwise, upon the surface, the ground or the vein sought to be appropriated. *Id.*

5. *Location completed after statutory period.*—A subsequent locator can not object that all the steps necessary to a valid location were not performed at the time of the location provided they were performed before other rights attached. This rule applies to the objection that the claim was not properly staked, or that its record was not made within the statutory period, or that its discovery shaft was not sunk to mineral at the time of its survey. *McGinnis v. Egbert*, 329

6. *Evidence of location.*—Prominent and permanent monuments, and stakes at the corners, properly posting notices, and distinctly marking the location on the ground, sufficiently establish the location and boundaries of a mining claim; but whether or not a sufficient location has been proved is a question of fact. *Du Prat v. James*, 341

7. *It is not so much the character of the monuments*, as satisfactory proof of their location, that is to fix the *locus in quo*. *Cullacott v. Cash M. Co.*, 392

8. *The existence and location of monuments* may become questions of fact, to be determined like other questions of fact, according to the rules of evidence. *Id.*

9. *Maintaining stakes.*—Whatever may be the duty of a locator to maintain his stakes, he can not be expected to renew, as early as January, stakes set up the previous fall. *McEvoy v. Hyman*, 397

10. *Monuments control course and distance.* The discovery cut and stakes are monuments. *Id.*

11. *Evidence of the value of a vein*, disclosed after the location, is immaterial to the question of the locator's title, as no discovery after location would make that location valid. *Upton v. Larkin*, 404

12. *Discovery of mineral made after location* will not validate a location made without any discovery of mineral before location. *Id.*

13. *Distinction between pure occupancy and a locator's title.*—Under the Federal and State statutes, two kinds of possession of mining ground are recognized: first, when the miner holds by occupancy alone; second, when he holds the full claim by virtue of a compliance with the location statutes. But when one attempts to make a statutory location of a full claim, and fails to comply with the law, all that portion of the location as marked on the surface, of which he is not in the actual occupation, is open to exploration and re-location by others. *Armstrong v. Lower*, 458

LOCATION. *Continued.*

14. *Monuments not placed on account of precipice.*—The west 600 feet of the Nabob lode, a 1,500-foot claim, were not staked, because the ground was precipitous and inaccessible. A later locator placed his stakes so as to include that part of the Nabob which was staked, and its workings then in operation. The prior location was upheld. *Eilers v. Boatman*, 462

15. *Location over drift run beyond its claimant's lines.*—The fact that the vein underneath a location was being worked by a party who was following a vein after it had left its patented side lines does not vitiate the location of the ground so made over such workings. *Id.*

16. *Secret underground mining* by parties having neither a patented or possessory title will not prevent a valid location by third parties on the surface embracing the apex of the lode. *Id.*

17. *Location is a question of fact.*—A finding by the Supreme Court of a Territory that the notice of the location of a claim contained a sufficient description, by reference to natural and permanent monuments, to identify it, and that the claim was so marked upon the ground that its boundaries could be readily traced, is a finding of fact; and, though styled by the judge a conclusion of law, must, by chapter 80 of the act of April 7, 1874, be taken by the appellate court to be true. *Id.*, 471

18. *The forcible eviction of the discoverer* and locator of a mineral-bearing lode or vein from the lode or vein before the sinking of the shaft which the statutes of Colorado require as one of the acts to complete title, and the prevention of his re-entry by threats of violence, excuse him as against the party keeping him out of possession, and so long as he is kept out of it, from complying with the requirements of the act in respect to a shaft. *Erhardt v. Boaro*, 472

19. *Legal effect of location.*—A valid and subsisting location has the effect of a grant from the United States of the right of possession to the land located. *Gwillim v. Donnellan*, 482

20. *Must be valid against United States.*—A location, to prevail in a suit between the applying and the adverse claim, must be valid as against the United States as well as against the location with which it is in contention. *Id.*

21. *A location based on discovery* can be made only by the discoverer or by one who claims under him; and if the discovery fails the location falls with it. *Id.*

22. *Location to prevail against prior possession.*—One who goes upon United States mineral lands, and without complying with the requirements of the law, or of local custom, works thereon, and relies exclusively on his possession and work, is not entitled to the possession as against another who subsequently peaceably locates a mining claim covering the same ground, and complies in all respects with the requirements of the federal and district mining laws and regulations; and the former is a trespasser from the time such second party has perfected his location and complied with the law. *Horswell v. Ruiz*, 488

23. *End lines.*—The provision of the mining laws requiring the end lines of each claim to be parallel is merely directory, and no consequence attaches to a deviation from such provision. *Id.*

LOCATION. *Continued.*

24. *Nominal location without development.*—A location made in 1865, under district rules, by posting a notice and filing a record, not followed by development, will not be upheld; if the rule allowed so loose a location it would be unreasonable. *Cons. Rep. M^t. Co. v. Lebanon Co.*, 490

25. *Priority between locations.*—Where the first location of a mining claim is valid, and the parties have kept it so by doing what is required by the mining laws, a subsequent location, however regular in form, is of no effect. *Garthe v. Hart*, 492

26. *Distinction between first occupant, intruder and statutory locator.*—A party who is in the prior possession of a piece of mining ground is entitled to maintain such possession as against a mere intruder, but not as against one who has subsequently located the same in compliance with the mining laws. *Id.*

27. *Facts of the case—Title affirmed to first occupant.*—The Golden Bell was discovered in February, 1883. Its location notice was placed and its shaft sunk the legal depth within the statutory period, but its record was not made within the time fixed by law. In April, the Verdo was discovered and its location and record completed. Afterward, and after the lapse of the statutory period, the location certificate of the Golden Bell was recorded: *Held*, that the Golden Bell took the ground in conflict. *Omar v. Soper*, 496

28. *Claim to lode by discoverer—Evidence of good faith.*—Evidence that the discoverer of a lode of mineral had worked almost continuously on the lode from the time of discovery to the beginning of an action contesting his claim, corroborated by witnesses and by the amount of work performed, is sufficient to establish his good faith in making a claim to the lode. *Id.*

29. *Locating over a working-prospect.*—Where defendants were in actual possession of a mining claim, and engaged in developing it, claiming to be the owners, plaintiff can not initiate a title thereto by a survey and the recording of a location certificate. *Id.*

30. *Natural objects and permanent monuments.*—The intention of the statute is to give one seeking to identify a recorded claim something in the nature of an initial point from which to start. The identification must be by reference to some natural object or permanent monument. *Drummond v. Long*, 510

31. *A mining location made without prior right of entry* upon the ground is void. There can be no valid location made without prior right of entry. Location confers no right of entry where such right did not previously exist. *Aurora Hill Co. v. 85 M. Co.*, 581

32. *Prior location against senior record.*—Where the local regulations of a mining district require that the boundaries of a mining claim shall be marked on the ground, and the notice of its location posted before it is recorded, priority as to the right of possession under conflicting locations is determined in accordance with the priority of marking the boundaries and posting the notices of the respective locations; and a location having the priority as to such acts will prevail over another location, although

LOCATION. *Continued.*

the notice of the latter was recorded prior to the marking of the boundaries and the posting of the notices of the former. *Gregory v. Pershbaker*, 602

83. *The government holds the title in trust* for those who locate veins on the public domain and for their vendees. *Noyes v. Mantle*, 611

84. *Only the unoccupied and unappropriated mineral lands* of the general government are subject to exploration and location. *Armstrong v. Lower*, 631

85. *Locator's right exclusive.*—When the locator has fully complied with the law in locating a mining claim, he is entitled to the exclusive possession and enjoyment thereof until it is forfeited or abandoned. *Id.*

86. *Location by trespass on third parties.*—Section 256 of the Code, does not prevent the admission of proof showing a failure to perform one of those acts essential to a valid location, though such proof also establishes the fact that actionable injuries were done to third parties who are neither parties nor privies to the action. *Id.*

87. *Location on the strike.*—The vein is the principal thing, and the location should be in conformity with the strike thereof. *Id.*

88. *Presumption that location covers vein.*—When one has discovered a lode upon the unappropriated public domain, and has, within the proper time, in good faith, performed all the subsequent acts essential to a valid location as provided by law, he is entitled to the presumption that his lode extends through the full length of the claim. *Id.*

89. *Idem.*—And where another by a subsequent and conflicting location, undertakes to hold a portion of the prior claim on the ground that the lode thereof does not extend to the conflicting area, the burden of proving such fact is upon the subsequent locator. *Id.*

90. *The locator owns only what his lines inclose* although not chargeable with fault in making them. It is better for him to lose part of the lode than to make title dependent on the results of developments made after lines have been chosen. *Iron Silver Co. v. Elgin Co.*, 641

See ADVERSE CLAIM, 7; BOUNDARIES; DISCOVERY; DISCOVERY SHAFT; LODE; RE-LOCATION.

LOCATION CERTIFICATE.

1. *A location certificate calling for its own discovery cut* and its own stakes is defective when it contains no reference to a natural object or permanent monument (to fix the locus of the claim). *McEvoy v. Hyman*, 397

2. *Amendment to location certificate favored—Re-location retroactive.*—The first record of a mining claim is usually, if not always, imperfect, and it is the policy of the law to give the locator an opportunity to correct his record when defects are found therein, and when it is so corrected the amendment takes effect with the original as of the date thereof. *Id.*

3. *Failure to record location certificate immaterial.*—The failure to record a location certificate within three months from the date of discovery of a lode of mineral, as provided by statute, does not inure to the benefit of the owners of an overlapping claim originating from a junior discovery, who made no attempt to re-locate the claim. *Omar v. Soper*, 497

LOCATION CERTIFICATE. *Continued.*

4. *A lode location certificate must contain a sufficient description, by reference to natural objects or permanent monuments. But it is not for the court, from the description, to say that its calls are not proper monuments. This fact is open to evidence as to the nature of the objects called for.* *Russell v. Chumasero*, 508

5. *A location certificate calling only for its own stakes and for adjoining claims, may be good if such claims are found on the ground with definite corners and boundaries.* *Id.*

6. *Location certificate held void for uncertainty, set forth at length in the statement.* *Drummond v. Long*, 510

LOCATION NOTICE.

1. *Effect of location notice pending complete location.*—A written notice of a claim to fifteen hundred feet on a mineral-bearing vein or lode in Colorado, signed by the discoverer thereof and posted on a stake at the point of discovery, when made in good faith, and not as a speculative location, is a valid location on seven hundred and fifty feet on the course of the lode or vein in each direction from that point, and gives the right of possession to the discoverer until the other steps necessary for completing the title can be taken according to law. *Erhardt v. Boaro*, 472

2. *Effect of notice, to protect claim.*—A notice of discovery, posted by the discoverers of a lode of mineral at the point of discovery, containing a specification of the extent of the claim, although no such specification was required to be made by statute, will protect the full extent of the claim against an overlapping claim, during the period allowed by statute for sinking a discovery shaft, even though the boundaries had not been marked. *Omar v. Soper*, 497

3. *Erasing names and changing dates on notice.*—Where one of two discoverers of a lode of mineral acquired the interest of the other, erased the name of the latter from the discovery stake, and changed the date thereon from the time of discovery to the time of acquiring the whole interest, but remained in actual possession, continuing the development, and claiming in good faith to be the owner, he did not forfeit any rights acquired by the prior discovery. *Id.*

LODE.

1. *Vein presumed to extend length of claim.*—The position of the vein with reference to the location is a fact upon which some proof must appear. But slight proof, however, will be sufficient to establish *prima facie* that the vein extends throughout the claim. *Armstrong v. Lower*, 458

2. *In the case of cross-lodes the elder location takes all the mineral within the space of intersection—with right of way only, to the owner of the cross-vein. And if the claimant of the cross-lode take the ore in the space of intersection he is a trespasser.* *Pardee v. Murray*, 515

3. *An impregnation, to the extent to which it may be traced as a body of ore, is a vein, lode or ledge, under section 2322, Rev. St. U. S., giving to the owner of a mineral claim, containing the top or apex of a vein, lode or ledge, the right to follow the same beyond the vertical side*

LODE. *Continued.*

lines, but between the vertical and lines, whether the ore is separated from the country rock by planes or strata of that rock visible to the eye, or is determinable in other ways, as by assay and analysis. *Hyman v. Wheeler*, 519

4. *A body of mineral, or mineral-bearing rock, in the general mass of country rock*, so far as it may continue unbroken, and without interruption, is a lode, whatever the boundaries may be. *Id.*

5. *With well-defined boundaries, very slight evidence of ore* within such boundaries will prove the existence of a lode. *Id.*

6. *Pocket in the country*.—If the entire mass of limestone in which a body of ore lies has been mineralized in the same way as the body of ore, and to some extent, and the body of ore is a casual concentration of unusual richness, the body of ore is not a lode. *Id.*

7. *Mineralized stratum along planes of contact*.—Strata lying along the plane of contact between blue and brown limestone, if mineralized to the extent of showing valuable minerals, and distinguishable from other parts of the country rock by carrying ore and by association with the plane of contact, constitute a lode, as far as the strata lying on or near the contact may show ore in appreciable quantities. *Id.*

8. *Identity of lodes—Persistence of ore*.—In determining whether a lode extends from defendant's claim to plaintiff's location, and has its apex therein, the persistence of the ore through these and the intervening claims is of little weight, unless there is evidence tending to show a crevice of continuous ore or mineralized rock; with such evidence it is of considerable weight. *Id.*

See APEX; BOUNDARIES, 1; DIP; LOCATION, 88; MINES, 8; PLACERS, 2-5, 8; SIDE VEINS.

MANDAMUS.

1. *Mandamus*.—An order to stay waste is discretionary, and will not be compelled by *mandamus*. *People v. The Circuit Judge*, 142

MAPS.

1. *Parties—Act requiring map to be kept*.—Under the act making the county surveyor *ex officio* inspector of mines and requiring him to make the plat of its workings in case the owner neglect so to do, and the county surveyor has the work done by deputy, the county surveyor himself is the proper party to sue for the cost of making such map. *Daniels v. Hilgard*, 280

2. *Sufficiency of map*.—In such case the defendant will not be heard to question the map as insufficient where it has been officially accepted as correct. *Id.*

3. *Necessity of maps*.—The court would be justified in discarding assignments of error based on testimony given with a map before the witness to which he refers when such map is not produced to the reviewing court. *Upton v. Larkin*, 404

See WORKINGS, 5.

MASTER AND SERVANT.

1. *Construction favorable to employees*.—A penal act concerning the mode in which employees are to be paid, is to be construed as passed in

MASTER AND SERVANT. *Continued.*

the interest of the employe and not so as to qualify powers previously enjoyed by him unless such powers are being used by way of collusion to defeat the operation of the act. *Shaffer v. Union M. Co.*, 59

2. *Safe place to work—Delegation of duty.*—An employer owes to his servant the duty of furnishing him a safe and proper place in which to pursue his work, so far as he is able to do so by the exercise of ordinary care and diligence; and this duty he can not delegate to an agent or servant, so as to excuse himself as to responsibility to one who has been injured by its non-performance. *Trihay v. Brooklyn Co.*, 535

3. *Notice to foreman.*—It is no defense that the injury was occasioned by the negligence of a foreman, who had the entire charge of the mine, as notice to him was notice to the company. *Id.*

4. *An act intended to prevent a class of contracts found to constantly engender distrust* and suspicion of unfair dealing between master and miner can not be countervailed by special contracts made in disregard of its terms. *Bourne v. Netherseal Co.*, 691

See NEGLIGENCE; WAGES.

MEASURE OF DAMAGES.

1. *Defense affecting only the measure of damages.*—In an action for breach of covenant against incumbrances based upon the fact that there was an outstanding coal privilege in the land, the answer set up that there was no coal in the land, and that the plaintiff had never been evicted, etc.: *Held*, that these matters could not defeat the plaintiff's right to recover, but related solely to the measure of damages. *Stambaugh v. Smith*, 82

2. *Damages after suit brought.*—In an action for breach of a covenant against incumbrances, money paid for a deed releasing certain incumbrances after suit brought may be recovered, and the deed may be introduced in evidence. *Id.*

3. *The measure of damages in an action for waste water*, supplied defendant from plaintiff's coal shaft, in the absence of special contract fixing the price, is its value to defendant, or what it was reasonably worth. It is no answer to the action that the water was going to waste; nor where a protection wall and a tank for its reception were built, with the consent, but not at the request, of the plaintiff, is it material to inquire what it would have cost to convey the water away by a drift. *Chicago Co. v. Northern Ill. Co.*, 198

4. *Duty of owner on approaching his terminals.*—It is the duty of a person working a coal mine on his own land, near the boundary line, to make surveys to prevent encroachment on the adjoining land, and to keep accurate accounts of the coal mined near the line, and if he fail to do so, the evidence as to the quantity of coal taken will be construed most strongly against him, and the least evidence of bad faith on his part would make every intendment in favor of the injured party. *Coal Creek Co. v. Moses*, 544

5. *Idem—Measure of damages, the value in place.*—But if such person is shown to have acted fairly, and the trespass is proved to have been unintentional and inadvertent, the measure of damages is the value

MEASURE OF DAMAGES. *Continued.*

of the coal *in situ* before the trespass, and the incidental injury, if any, to the land, by the taking or mode of taking. *Id.*

6. *Compensation only, the rule.*—The weight of recent authority, even in actions at law, where the trespass is inadvertent by one miner on the lands of another, is to limit the recovery to just compensation, and this rule is certainly not changed by bringing the suit in chancery. *Id.*

7. *No deduction for expenses in favor of the fraud of co-tenant.*—(Co-lessees with plaintiff, an absent owner in the lease, struck oil, shut down the well and advertised it a failure. They then, through a stranger, secretly purchased plaintiff's interest for less than he had paid for it, whereupon they resumed work and pumped largely: *Held*, that the fraud being proved, plaintiff was entitled to his share of the gross receipts for oil without any allowance for expenses. *Foster v. Weaver*, 551

8. *Conversion of ore.*—Value at the mine adopted as the proper measure. *Aurora Hill Co. v. 85 Mining Co.*, 581

MINES.

1. *Open and unopened mines.*—If a lease of land be made for life, or for years, in part of which there is a mine open, the lessee may dig it. If the mine was not open at the time of the lease made, the lessee can not open it. *Saunders' Case*, 109

2. *Mines mentioned.*—If a man hath mines hid within his land, and leases his land and all mines therein, the lessee may dig for them. *Id.*

3. *Veins and mines.*—The extent of the meaning of the word "mines," and its identity with "veins," discussed by counsel, with collation of the authorities. *Crouch v. Puryear*, 113

4. *Dormant mine.*—It is a question of degree, to be established by evidence, whether the working of a dormant or abandoned mine by a tenant for life is waste or not: *Semb'e*, that a mine, the working of which had been discontinued for twenty or thirty years, in consequence of its not having been remunerative, might, after that time, be worked by a succeeding tenant for life; but a mine, the working of which has been abandoned by the owner of the inheritance for the advantage of the property, can not be worked by a succeeding tenant for life. *Legge v. Legge*, 130

5. *New openings to old mine or quarry.*—Where a mine or quarry is once open the sinking of a new pit on the same vein, or the breaking of ground in a new place in the same rock is not the opening of a new mine or a new quarry. *Elias v. Snowden Co.*, 143

See EXHAUSTED MINE.

MISTAKE.

1. *Mutual mistake.*—Where a contract is entered into upon an assumption by the parties of the existence of a certain fact, as to which it afterward appears that the parties were mutually mistaken, the contract obligation ceases. *Muhlenberg v. Henning*, 422

See WARRANTY, 7.

MORTGAGE.

1. *Working by mortgagor in possession.*—The opening of a quarry by a
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MORTGAGE. Continued.

mortgagor in possession enures to the benefit of the mortgagee of the term, so as to render him dispunishable for waste if he worked the quarry during the term. *Elias v. Snowden Co.*, 143

See RE-LOCATION, 6.

NATURAL GAS.

1. *The transportation of natural gas for public consumption is a public use*, and a corporation engaged in its supply is vested with the right of eminent domain. An injunction against laying its pipes, after compensation tendered, was, therefore, properly denied. *Johnston's App.*, 556

NEGLIGENCE.

1. *Plaintiff was injured by a scale while timbering a fresh slope.*—The evidence tended to show that the ground required immediate timbering, as the slope was broken, to keep it safe: *Held*, sufficient proof of negligence to sustain a verdict. *Trihay v. Brooklyn Co.*, 535

2. *Ordinary and extraordinary risks.*—Where an employe contracts to perform, for extra compensation, hazardous service, he only contracts to take upon himself the risks incident to the employment. He does not agree to take extraordinary risks, growing out of the negligence of the employer, to which his attention had not been called. *Id.*

3. *Defective ladder—Employer not an insurer of safety, but bound to diligence.*—A complaint for damages arising out of an accident caused by the breaking of a ladder, averred an absolute duty in defendant to keep the ladder safe and secure: *Held*, that the duty was stated too broadly and they were bound only to reasonable care and diligence to produce such condition. *Canter v. Colorado United M. Co.*, 559

See MASTER AND SERVANT.

NEW TRIAL.

1. *Cumulative testimony.*—A motion for a new trial on the ground of newly discovered evidence is properly overruled when the affidavit in support of the motion fails to disclose legal diligence to discover the evidence before trial, or when the evidence is merely cumulative. *Snyder v. Burnham*, 562

NOTICE.

1. *Notice without discovery inoperative.*—The mere posting of a notice that the poster has located a mining claim, without discovery or knowledge on his part of the existence of metal there, or in its immediate vicinity, is a speculative proceeding which initiates no right. *Erhardt v. Boaro*, 473

See ADVERSE CLAIM, 12; LOCATION NOTICE; MASTER AND SERVANT, 3.

OPTION—See VENDOR AND PURCHASER, 4.

ORE.

1. *Evidence of value of ore from other places in the same mine is of little value in ascertaining the contents of any lot in question; whether competent at all, not decided.* *Phipps v. Hully*, 350

PARTNERSHIP.

1. *The relation implied.*—Persons jointly conducting a mining venture are partners, though there is no agreement for a partnership. *Snyder v. Burnham*, 562
2. *Adventurers testing a prospect under an option contract*, are partners. *Manville v. Parks*, 565
3. *A mining partnership exists where several parties co-operate to work a mine*, and ownership of the mine is not essential to such partnership. *Id.*
4. *A partnership may be implied from the acts of the parties without express contract.* *Id.*
5. *Mining partners have power to bind each other by dealings on credit for the working of the mine as a power incidental to the relation*—not extending to the borrowing of money or the giving of notes. *Id.*
6. *Partners may by contract limit their powers inter sese*, but such limitation does not bind strangers having no notice thereof. And such limitation and notice must be specially pleaded. *Id.*
7. *The partnership relation is one of trust*, and each member is held to a strict rule of good faith and fair and open dealing. *Jennings v. Rickard*, 624
8. *Partner buying out partner while concealing outside offer.*—Defendants held in their names certain claims which had been taken up under a prospecting arrangement between themselves and the plaintiff. They bought out his interest at an agreed price, not disclosing an offer which had been made them by a stranger for one of the claims. After purchasing plaintiff's interest they sold out on this offer: *Held*, that plaintiff was entitled to recover his proportion of the excess in price received for this claim. *Id.*

PATENT.

1. *Patent over ditch-head after appropriation.*—A settler before patent had diverted water from a natural stream; afterward the land covering that portion of the stream from which his flow was led was patented to another: *Held*, that he acquired no right to the water as against the United States or its grantee. *Vansickle v. Haines*, 201
2. *The flow of water is an incident to the soil and goes with the land to the patentee.* *Id.*
3. *Execution sale of mine pending application for patent.*—The locator of mining ground under U. S. Rev. St., prior to the actual payment of the purchase money, and the reception by him of the receipt therefor, issued by the register and receiver of the proper land office, possesses a mere privilege to purchase the property, and a constable's sale of the mine before payment, only passes that privilege. If the sale is valid, the purchaser can only step into the shoes of the execution debtor, and thereby obtain a right to go on, perform the necessary acts, pay the purchase money, contest the rights of other adverse claimants, and make the entry and receive the certificate of purchase himself. If the judgment debtor subsequently performs these acts himself, and receives the title from the government, a new and further title becomes vested in the judgment debtor, which does not pass by virtue of the officer's deed. *Hamilton v. Southern Nevada Co.*, 814

PATENT. *Continued.*

4. *Title between entry and patent.*—A party having paid the purchase money, and received the certificate of purchase, is the owner of the land. The United States has ceased to have any pecuniary interest in it. It holds the naked, dry, legal title for the holder of the certificate. *Id.*

5. *Such a certificate of purchase can not be collaterally assailed.* *Id.*

6. *Courts will not review the action of the land department* as to the issue of a mining patent, except when fraud has been practiced upon a party or the officers have clearly mistaken the law of the case. *Jeffords v. Hine*, 575

See ADVERSE CLAIM; DESCRIPTION, 2; LAND OFFICE; RECEIVER'S RECEIPT.

PERSONAL LIABILITY.

1. *Personal liability act—Effect upon stock.*—The statutory personal liability of stockholders in mining corporations does not affect the stock itself; and such liability does not, therefore, amount to a breach of warranty against incumbrances, upon a sale by a stockholder by whom such liability has been incurred. *Williams v. Hanna*, 73

2. *When liability attaches—Transfer.*—The eleventh section of the act for the incorporation of manufacturing and mining companies provides that "the stockholders of such company shall be individually liable, jointly and severally, for all debts due and owing laborers, servants and apprentices for services rendered, and to other creditors of the company they shall be liable to an amount equal to the stock held by them, respectively." The person holding stock at the time a debt is contracted, is the person who is liable, under the latter clause of this section, to an amount equal to the stock held by him, and a subsequent holder is not liable. *Id.*

PLACERS.

1. *The size of placer claims* may be limited by district rule. *Rosenthal v. Ives*, 324

2. *Patent for placer including specified lode.*—In procuring a patent for a placer mine claim under § 2333 of the Revised Statutes, where the claimant is also in possession of a lode or vein included within the boundaries of his placer claim, the patent shall cover both, if he makes this known and pays \$5 per acre for twenty-five feet on each side of his vein and \$2.50 per acre for the remainder of his placer claim. *Reynolds v. Iron Silver Co.*, 591

3. *Lodes after discovered.*—Where no such vein or lode is known to exist the patent for a placer claim shall carry all such veins or lodes within its boundaries which may be afterward found to exist under its surface. *Id.*

4. *But where a vein or lode is known to exist* under the surface included in such patent, and is not in claimant's possession, and not mentioned in the claim on which the patent issues, the title to such vein or lode remains in the United States, unless previously conveyed to some one else, and does not pass to the patentee, who thereby acquires no interest in such vein or lode. *Id.*

5. *Gravel deposit or stratum no lode.*—A mineral lode, as that term

PLACERS. *Continued.*

is used by miners, and in the mining acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock, but does not include a deposit of gold-bearing gravel, although the same lies between clearly defined strata of rock, and has an average drop of several degrees. Such a deposit of gravel is a placer, as that term is used by miners and in section 2329 of United States Revised Statutes. *Gregory v. Pershbaker*, 602

6. *Placer claims include all forms of deposit excepting veins of quartz or other rock in place. Id.*

7. *Placer location without discovery.*—The location of a placer mining claim is valid, notwithstanding no valuable mineral had been actually discovered in the land before the location was made. *Id.*

8. *A placer patent does not pass title to a lode* discovered, located, and recorded before the date of the application for a placer patent; and it is immaterial whether or not the existence of such lode or of the location thereon was known to the placer applicant. *Noyes v. Mantle*, 611

See ADVERSE CLAIM, 4; EJECTMENT, 9.

PLEADING AND PRACTICE.

1. *Special issues, how framed.*—Where special issues are submitted to a jury, they should include all questions of fact raised by the pleadings and necessary to determine the case, and should be separately and distinctly stated, so that each question should relate to only one fact. *Phoenix Water Co. v. Fletcher*, 186

2. *Scope of assignment of error for refusal to grant new trial.*—Under the general assignment of error that the court should have granted a new trial, the plaintiff in error may urge the rejection of proper and the admission of improper evidence, also the giving of improper and the refusal of proper instructions, and that the evidence does not sustain the verdict; all of which are grounds for granting a new trial. *Chicago & R. I. R. R. v. N. Ill. Co.*, 198

3. *Limits of cross-examination.*—On cross-examination a party has no right to call out evidence having no reference to any portion of the witness' testimony in chief. *Id.*

4. *Pleading facts under different statutes.*—Where a complainant states facts sufficient, under the terms of a State law or of an act of Congress on the same subject, he is entitled to the rights given by either. *Hobart v. Ford*, 236

5. *The construction of pleadings is for the court* and not for the jury. *Taylor v. Middleton*, 284

6. *Prayer has no office under code pleading.*—Under the code, a party is entitled to such relief as his evidence, together with the facts averred in the body of his pleading, justify, regardless of the relief demanded in his prayer. *Becker v. Pugh*, 304

7. *Rule where the answer denies all equities.*—The general rule, that when the answer of the defendant in a cause in equity is direct, positive and unequivocal in its denial of the allegations in the bill, and an answer on oath is not waived, the complainant will not be entitled to a decree unless these denials are disproved by evidence of greater weight than

PLEADING AND PRACTICE. *Continued.*

the testimony of one witness, or by that of one witness with corroborating circumstances, applies when the equity of the complainant's bill is the allegation of fraud. *Southern Development Co. v. Silva*, 435

8. *Finding in disregard of referee's conclusions.*—A court of general jurisdiction, in passing upon the findings of law and fact contained in a referee's report in a case of trespass, sustained exceptions to several conclusions of law therein contained, and also sustained a motion to enter such a judgment as the facts proven and the law warrant: *Held*, that there was nothing in these facts, or the language used, to show that the court disregarded the findings of fact by the referee, and proceeded on its own findings, thereby exceeding its jurisdiction. *Little Pittsburg Co. v. Little Chief Co.*, 655

See AMENDMENT; APPEAL.

POSSESSION.

1. *Transfer of possession without deed.*—A locator takes as by grant from the government, and the thing granted is real estate, and should be conveyed by deed; hence, proof of possession of a mining claim, without any valid location, and of transfer of possession by mere delivery, is immaterial in a suit where the right to possession is contested—and should be excluded. *Hopkins v. Noyes*, 287

2. *A finding that a party is in possession*, in a suit supporting an adverse claim, is not necessary where the facts found show a lawful location and a right to the possession. *Eilers v. Boatman*, 463

See DIP, 2; LOCATION.

PROBATE.

1. *Suit for unprobated claim.*—An action may be maintained against the estate of a decedent without previous presentation to the county court for allowance. *Ray v. Hodge*, 371

PROSPECTING CONTRACT.

1. *Extent of obligation to search for coal.*—Under a contract binding the defendant to pay a certain price for a tract of land in case he found a vein of good merchantable coal, not less than four feet in thickness, in a shaft then being sunk by him on the land, it was held that it was his duty to make a reasonable effort to find coal of the character described, in view of the depth of the known veins in the vicinity, and by using the ordinary and usual methods and appliances, and that what constituted such reasonable effort was a question for the jury, under all the evidence. *Skidmore v. Eikenberry*, 360

2. *Prospecting contract rescinded between discovery and location.*—Where an agreement to prospect for and locate lodes for the benefit of all the parties thereto has been dissolved by mutual consent, none of the parties are under obligations to complete locations already initiated, for the benefit of the concern. And if some of them do so the locations are for their sole benefit. *Page v. Summers*, 617

3. *Sufficient proof of abandonment of prospecting contract.*—Where two persons enter into a contract, the one to prospect and the other to furnish the necessary provisions, do the discovery work, attend to the sur-

PROSPECTING CONTRACT. *Continued.*

veys, file certificates of location, etc., such contract, having been partly performed on both sides, can not be regarded as rescinded, unless the circumstances show an absolute abandonment. Proof of negotiations for an abandonment is insufficient to establish a rescission. But under the testimony the finding that the arrangement had been discarded before the making of the discovery in question, was upheld. *Chadbourn v. Davis*, 620

4. *Concealing discoveries from outfitter.*—Defendants, while working under a prospecting contract, discovered lodes which they located but never mentioned to plaintiff, their outfitter. After a dissolution of the partnership arrangement they sold these claims for a large price: *Held*, that they were bound to account for plaintiff's proportion of the purchase money. *Jennings v. Rickard*, 624

5. *A prospector discovered "float"* but did not find the lode from which it came until after a dissolution of the prospecting partnership: *Held*, that his failure to follow up the prospect during the partnership would not of itself raise any inference of fraudulent behavior nor entitle his associates to share in the lode when afterward found. *Id.*

See CONTRACT, 3; WARRANTY, 10.

RECEIVER.

1. *Insolvency—Allowance for charges.*—A receiver ought not to be appointed in a proceeding for the partition of property theretofore left in the hands of one of the parties to manage in the common interest, if there is no allegation against him of insolvency; but if he objects to the appointment of a receiver he can not, pending further proceedings, charge for his services. *Pierce v. Pierce*, 675

RECEIVER'S RECEIPT.

1. *The receiver's receipt*, uncanceled, is equivalent to a patent so far as the rights of third parties are concerned. *Aurora Hill Co. v. 85 M. Co.*, 581

See ADVERSE CLAIM, 6; PATENT, 4, 5.

RECORD—See LOCATION CERTIFICATE.

RE-LOCATION.

1. *Relation.*—The statute authorizes a change of boundaries in certain cases and a re-location of the claim by the owners; it also makes provision for correcting errors in the original location certificate and when such amendment is made before adverse rights intervene the amendment relates back to the original location. *McGinnis v. Egbert*, 829

2. *Proof of re-location by strangers* must be preceded by proof of abandonment by the original locators. *Id.*

3. *Entry to re-locate no trespass.*—The failure of the locator of a mining claim to perform his annual labor subjects the claim to re-location and a peaceable entry in good faith may be made for that purpose, although the claim is occupied by the original locator. *Du Prat v. James*, 841

4. *Surveying in and recording over ground, no re-location.*—Under Gen. St. Colo., § 2411, providing for the re-location of abandoned lode

RE-LOCATION. *Continued.*

claims by sinking a new discovery shaft or deepening the old one, fixing new boundaries or adopting the old ones, renewing the boundary posts, erecting a new location stake, and stating in the certificate of location that the whole or part is located as abandoned property—the surveying, staking and recording over the territory of the abandoned claim does not constitute a re-location of that claim. *Omar v. Soper*, 497

5. *The re-location of an abandoned mining claim* is made in substantially the same manner as the original location thereof. The re-locator must perform all the acts required in making a valid original location, in the same manner and within the same time as though the premises had always remained a part of the unappropriated public domain, except that he may adopt the boundary stakes of the abandoned claim, and instead of sinking a new discovery shaft, he may sink the old one ten feet deeper. *Armstrong v. Lower*, 631

6. *Re-location by collusion after mortgage.*—The owners of a mining claim who have mortgaged the same, may not abandon the same so as to permit the lands to be located as unoccupied mineral lands and defeat the mortgage lien thereby. *Alexander v. Sherman*, 633

See ANNUAL LABOR, 7, 10.

RESCISSION—See LEASE, 3.

SALE—See WARRANTY, 7.

SEAL—See CORPORATIONS, 1.

SIDE VEINS.

1. *Side veins.*—The object of location statutes is not merely to fix the amount of surface territory allowed the locator for working purposes, but also to protect him in the exclusive possession and enjoyment of his lode, and all other veins, lodes or ledges, the apexes of which are within his surface boundaries. *Armstrong v. Lower*, 632

See APEX, 2.

SPECIFIC PERFORMANCE.

1. *Leases in contention ordered to pay royalties into court.*—Plaintiffs sued for specific performance of an agreement for a lease of coal mines at a royalty of 10d. per ton. Defendant had gone into possession. He claimed allowance for expenditure, and also that the royalty was at a lesser rate. He was also maintaining suit for damages against plaintiffs for fraudulently inducing him into the contract: *Held*, that defendant should pay into court at the rate he conceded to be due, and as his getting the coal had diminished the value of the property, he would not have the usual option of giving up possession instead of paying the money into court. *Lewis v. James*, 649

SPRINGS.

1. *Subterranean stream—No action against mine draining well.*—The owner of land through which water flows in a subterranean course has no right or interest in it which will enable him to maintain an action against a land owner, who, in carrying on mining operations in his own

SPRINGS. *Continued.*

land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry. *Acton v. Blundell*, 168

2. *Quære, if the well had been ancient*, whether there would have been any difference? *Id.*

8. *Spring drained by quarry*.—The owner of a farm may dig a ditch to drain his land, or open and work a quarry upon it, although by so doing, he intercepts one of the underground sources of a spring on his neighbor's land, which supplies a small stream of water flowing partly through the land of each, and thereby diminishes the natural supply of water, to the injury of the adjoining proprietor. *Ellis v. Duncan*, 182

4. *Idem—Damnum absque injuria*.—The rule that a man has a right to the free and absolute use of his property, so long as he does not directly invade that of his neighbor, or consequentially injure his perceptible and clearly defined rights, is applicable to the interruption of the sub-surface supplies of a stream, by the owner of the soil, and the damage resulting from such an interruption is not the subject of legal redress. *Id.*

STATUTE.

1. A "*casus omissus*" in a statute can never be supplied by judicial construction. *Com. v. Wilkesbarre Coal Co.*, 31

2. *Carelessness in the wording of statutes* commented on. *Hobart v. Ford*, 236

3. *Intendment in favor of legislative power*.—The question whether a particular requirement is in excess of the legislative power to establish due police regulations is one to be determined by the legislature itself and such determination ought not to be interfered with unless the legislature manifestly transcend its powers. *Daniels v. Hilgard*, 280

See PLEADING AND PRACTICE, 4.

STATUTE OF LIMITATIONS.

1. *The Statute of Limitations* does not run against the United States. *Vansickle v. Haines*, 201

2. *The Statute of Limitations must be specially pleaded*.—It will not be considered when urged for the first time in the appellate court, and will not be noticed on a demurrer alleging generally that the complaint states no cause of action. *Jennings v. Rickard*, 624

See ADVERSE POSSESSION; WATER, 5.

STIPULATION.

1. *Where parties stipulate* in open court as to their respective sources of title, evidence in contradiction thereof is inadmissible. *Rockwell v. Graham*, 299

STOCK.

1. *Corporation stocks are transferable* in such manner as may be prescribed by the by-laws. *Williams v. Hanna*, 73

2. *Sale of stock for less than par*.—*Held, arguendo*, that the officers of a corporation can not properly sell the corporate stock for less than its par value. *Oliphant v. Woodburn Coal Co.*, 365

3. *Special injury to particular stockholder*.—A holder of corporation stock can not maintain an action against the company for damages in the

STOCK. *Continued.*

depreciation of his stock, resulting from mismanagement of the affairs of the company, unless he shows that the injury he has sustained to his stock is peculiar to himself, and does not fall equally upon the other stockholders. *Id.*

See PERSONAL LIABILITY; WARRANTY, 3.

SURFACE—See LEASE, 1.

SURFACE SUPPORT.

1. *In every grant of mines there is an implied reserve of surface support* which is not to be taken away by the construction to such result of general covenants as to mode of working them. *Proud v. Bates*, 227

2. *Surface support not affected by reservation and way leave.*—Though a lease reserves to the lessor the minerals with way leave so extensive that it allows the carriage of minerals not under the demised property, it does not deprive the lessee of the right of support to the surface of the land as incident to the demise. *Id.*

3. *Covenant to win the coal without regard to surface.*—A covenant in a coal lease "to carry on the colliery in a fair, proper and orderly manner, and according to the best and most approved method of working collieries of a like nature on the rivers Tyne and Wear, and so as to produce with safety the greatest quantity of merchantable coals from and out of each and every the workable seams thereof:" *Held*, not only to authorize but to bind the lessees so to work the mines as to get out the largest quantity of coal consistent with the safety of the mines, without regard to the surface or to buildings erected subsequent to the lease. *Shafto v. Johnson*, 262

See EXHAUSTED MINE, 1; INJUNCTION, 7.

TENANT IN COMMON—See EJECTMENT, 6.

TENANT FOR LIFE.

1. *Account—Estrepeinent.*—If our courts, under their chancery powers, may direct an account between tenants for life and those in remainder as to coal mined by the life tenant, yet estrepeinent is not the remedy for obtaining relief in such a case. *Irwin v. Corode*, 120

2. *Facts of the case—Land sold to coal company.*—A tenant for life, claiming under a will, sold to a coal company all her right, title and interest to the coal in the land, without limit as to the quantity of coal to be taken therefrom: *Held*, that estrepeinent did not lie in favor of those entitled in remainder, to restrain the company from working, largely for sale, a mine which had been worked during the life of the testator for the use of the farm and for sale in the neighborhood. *Id.*

3. *Rights of tenant for life.*—Tenant for life may work quarries or mines opened upon the land before the commencement of his life estate, and may also cut timber necessary to clear the land or for other purposes of husbandry. *Lynn's App.*, 126

4. *The rights and privileges of tenant for life are greater in Pennsylvania than under common law in England.* *Id.*

5. *Mine disused.*—A life tenant may work a mine for his own profit where the owner of the fee in his lifetime opened it, even though he may

TENANT FOR LIFE. *Continued.*

have discontinued working it for a very long period of years. *Gaines v. Green Pond Co.*, 153
See LACHES 1; WASTE.

TENDER.

1. *A tender of compensation made in good faith and refused, though informal, will in equity throw the costs on the party who should have accepted it. Coal Creek M. Co. v. Moses*, 544

TRESPASS.

1. *Burden of proof, when cast on defendant.*—Where ore has been taken by willful trespass from the plaintiff's ground, part before and part since the plaintiff became owner of the premises, the burden of proof is on the defendant to show how much was taken before the change of ownership; otherwise he will be held for the whole. *Little Pittsburg Co. v. Little Chief Co.*, 655

2. *A principal is bound to know what his agent does* in the course of his employment, and the rule casting the burden of proof on defendant corporation to show what amount of the ore was taken before plaintiff purchased, will not be changed on account of the ore being taken by the superintendent without the knowledge of his company. *Id.*

3. *No favor to special pleading in trespass.*—Appellant, charged with entering upon appellee's mining property and converting ore, having denied such entry and conversion *in toto*, failed upon the trial to sustain this position, and then attempted to show that the entry was made before the appellee owned the mine: *Held*, there being evidence to show that the appellant had full knowledge of the trespass, that it could not demand a new trial on the ground that there was no issue formed by the pleading on the fact that the entry was made before the appellee owned the mine. *Id.*

See INJUNCTION, 1, 3; MEASURE OF DAMAGES, 8.

TRUSTS.

1. *A case of constructive trust must rest on fraud*, either actually intended or resulting from a failure to recognize and observe the rules of business integrity. *Pierce v. Pierce*, 675

TUNNEL.

1. *Enjoining interference with tunnel.*—If, by the local customs, the owner of one mining claim has a right to construct a tunnel through an adjoining claim, in order to enable him to work his own claim, a court of equity may enjoin any interference with that right. *Bliss v. Kingdom*, 239

See WAY, 4.

VENDOR AND PURCHASER.

1. *Purchaser concealing existence of mine on land.*—A person who knows that there is a mine on the land of another, of which fact the owner is ignorant, may nevertheless buy it without disclosing his knowledge of its existence to the owner, and this will be no fraud on the part of the purchaser. *Caples v. Steel*, 1

VENDOR AND PURCHASER. *Continued.*

2. *Where, however, one about to purchase land wilfully misstates any material fact to the owner, or by any act intentionally misleads him in regard to the value of the land, and through these misrepresentations succeeds in inducing the owner to part with his property for less than its value, a court of equity will relieve him, and set aside the contract thus made as a fraudulent transaction. Id.*

3. *Vendes examining for himself.*—When the purchaser of a property undertakes to make investigations of his own respecting it before concluding the contract of purchase, and the vendor does nothing to prevent his investigations from being as full as he chooses, the purchaser can not afterward allege that the vendor made representations respecting the subject investigated which were false. *Southern Development Co. v. Silva*, 435

4. *Option and mutuality.*—In an action on a contract, want of mutuality can not be set up as a defense by the party who has received the benefit, simply because it was left optional with the other party as to whether he would enforce his right. *Waterman v. Waterman*, 687

5. *Question of sale or security.*—Evidence considered, and held to not sustain the position that the contract to convey was given simply as security for the money advanced. *Id.*

See ADVERSE CLAIM, 10; AGENT, 2.

VENTILATION.

1. *Safe working of colliery—Air must go to the headings.*—By rule 1 of the general (statutory) rules to be observed in every colliery or coal mine, and ironstone mine, by the owner or agent thereof, "an adequate amount of ventilation shall be constantly produced in all coal mines, etc., to dilute and render harmless noxious gases, to such an extent that the working places, and the traveling roads to or from such working places, shall, under ordinary circumstances, be in a fit state for working and passing therein." *Held*, that it was not sufficient compliance with this rule to cause ventilation to pass along the working places and traveling roads, but that so much of the mine must be kept so ventilated as to render the working places and traveling roads safe. *Brough v. Homfray*, 6

2. *Two outlets.*—The act requires two outlets at least 150 feet apart, at every place where coal mining is carried on, but it does not require these two outlets to belong to the same mine. *Com. v. Bonnell*, 14

3. *Constitutionality of Ventilation Act.*—The coal mine ventilation law, act of March 3, 1871, is constitutional, and the court will enforce strict compliance with all its provisions. *Id.*

4. *Abuse of the act.*—The proviso to the third section does not authorize the production of coal for market under the pretext of "making another opening through coal." *Id.*

5. *Distant heading reached by incline from old workings.*—Where an incline from old workings which had all the statutory outlets has been carried down along the seams of coal several hundred feet, and coal is there developed and worked through such incline without other access to the surface, it is practically a new mine with but a single outlet, within the inhibition of the mine ventilation act, and an injunction will be granted

VENTILATION. *Continued.*

restraining the occupiers of the same from thus working it. *Com. v. Wilkesbarre*, 31

6. *It is immaterial whether the two outlets belong to the same mine or not. Id.*

7. *The ventilation act is constitutional. Id.*

8. *Liability of manager for insufficient ventilation.*—By the Coal Mines Regulation Act, S. 51, it is provided that in the event of any contravention of the general rules set out in that section, the owner, agent and manager, shall be each guilty of an offense, unless he prove that he has taken all reasonable means to prevent such contravention. The first of such general rules provides that an adequate amount of ventilation shall be constantly produced in every mine. The respondent, who was a certified manager of a colliery, working upon a salary, was charged with an offense under section 51, rule 1. It was proved that the mine was improperly ventilated, and that the respondent might have *improved* the ventilation with the resources at his disposal, but that the requisite provision for the *proper* ventilation of the mine would have involved an outlay of £200: *Held*, that he was not chargeable for anything which involved an outlay of money, but was responsible for failure to use the means at his disposal for bettering the ventilation. *Hall v. Hopwood*, 42

VERDICT.

1. *Supervision exercised over special verdicts.*—It is the province of the court to determine as to what facts the jury shall find specially, and neither party has the right to dictate the terms of any particular question to be submitted to the jury. *American Co. v. Bradford*, 190

2. *Verdict against evidence.*—When the evidence is conflicting, it is a question for the jury to determine from all the circumstances to whom they will give credit, and their finding, when it is not clearly against the evidence, will not be disturbed. *Chicago & R. I. R. R. Co. v. N. Ill. Co.*, 198

See ADVERSE CLAIM, 17.

WAGES.

1. *Wages are the reward of labor* and always come of contract express or implied. *Penn. Coal Co. v. Costello*, 47

2. *Wages of skilled miners.*—Wages earned by the personal manual labor of the debtor are exempt from attachment, although his superior skill and care as a miner may entitle him to a greater compensation than the common laborer. *Id.*

3. *Facts of the case—Breastmen and laborers in coal mining.*—Two miners are employed in a chamber; these employ one laborer between them. The money is paid to one or both the miners, who pay the laborer at a certain rate, or he may give notice and draw his own pay direct from the operator: *Held*, that the fact of the employment of this third party as a laborer under them did not deprive the money coming to them of the character of wages of labor under the act exempting such wages from attachment. *Id.*

4. *Insufficient answer, denying the note sued on but not the labor for which it was given.*—The complaint alleged that defendants were part-

WAGES. *Continued.*

ners under a certain firm name, engaged in digging gold at Pike's Peak; that one K. was their agent; that plaintiff worked for them, at their request; that plaintiff accounted with said K. as their agent, who had given him, as such agent, a note for the amount due, which note defendants had afterward promised to pay. The answer denied the partnership and the execution of the note, and the authority of the agent, K., in that behalf: *Held*, that judgment was properly rendered against the defendants, they not denying the fact of indebtedness nor the doing of the work at their request, even conceding the fact that they were not partners and that K. had no authority to execute the note in question. *Risto v. Harris*, 53

5. *Condition in rules allowing miner to leave without notice.*—Under a contract for services as miner calling for a set of rules, one of which provided that "any employe wishing in good faith to leave" may do so without notice: *Held*, that the contract gave him the right to leave at any time, whether there was good cause or not. *Wilmington Coal Co. v. Lamb*, 56

6. *Damage can not accrue where special contract allows of the act complained of.*—Where an employe leaves the service before the expiration of his period of employment under a clause in his contract allowing him such privilege, it is immaterial whether his leaving damaged his employer or not, and the latter can not set off any claim for damages in the action against him for the wages due and unpaid. *Id.*

7. *Money payment act.*—A law prohibiting corporations from paying their employes in anything but money is a valid exercise of legislative power. *Shaffer v. Union M. Co.*, 59

8. *Validity of orders drawn against wages.*—The act entitled, "An act to prohibit the payment of employes of certain corporations operating in Allegheny county otherwise than in legal tender money of the United States," is constitutional so far as it affects the corporations named, but it was not intended to restrict nor does it restrict the employes from drawing orders on the corporations for wages due, in favor of merchants with whom the employes may have run accounts; and such orders being accepted by the corporations constitute a valid assignment of the wages. *Id.*

WARRANTY.

1. *Either knowledge or warranty must be averred.*—Case for selling a jewel, affirming it to be a bezoar-stone when it was not a bezoar-stone, will not lie unless it be alleged that defendant *knew* it was not a bezoar-stone or that he *warranted* it was a bezoar. *Chandelor v. Lopus*, 70

2. *Warranty runs with the land.*—The vendor of a mining claim sold with warranty is, on the ground of interest, not a competent witness for his vendee on the question of title, the warranty being of real estate and running with the land. With personalty the warranty is only to the original vendee. *Blackwell v. Atkinson*, 71

3. *Warranty of stock no warranty against corporate debts.*—A warranty that mining stock transferred, or the title thereto, is free and clear of all incumbrances, debts or liabilities, or an agreement to vest the "clear

WARRANTY. *Continued.*

title" in the purchaser, is in no sense a warranty that the corporation itself is free from indebtedness. *Williams v. Hanna*, 78

4. *In an action on a covenant against incumbrances* it is not necessary to aver or prove an eviction. *Stambaugh v. Smith*, 82

5. *Covenant of seizin*.—In an action upon the special covenant of seizin in a deed, a breach is not sufficiently shown by an averment negating the legal seizin of the covenantor at the time the covenant was made, but his seizin in fact must also be negated. *Id.*

6. *Covenant against incumbrances*.—A covenant against incumbrances is broken as soon as made, if an incumbrance in fact exists; but in an action for breach thereof only nominal damages can be recovered unless it be shown that the covenantee has removed the incumbrance or has been disturbed in his possession. *Id.*

7. *Warranty of quality, by comparison—Mistake*.—Where, upon a sale of coal, the vendor warranted that it should be "of good and of as good quality as" certain coal then being landed "at the mills of Havens," in the same city, this was a warranty of the good quality of the coal, even though it appeared that there were no such mills as those called for in the terms of the warranty. *Pearson v. Martin*, 95

8. *Express warranty*.—Where there is an express warranty, there is no room for implications. *McGraw v. Fletcher*, 98

9. *"Complete in everything for working"*.—A provision in a contract that a drilling machine shall be "complete in everything for working:" *Held*, no warranty of what the machine could do, but only an agreement that it should be delivered fully equipped. *Id.*

10. *Drilling machine bought for prospecting purposes*.—Fletcher, the plaintiff, sold a patent diamond drill to defendant's intestate. Plaintiff knew that he intended to prospect for minerals with it, and stated that the machine had been used for that purpose, but both parties knew that the machine had not been constructed for this species of work and that its merits in that regard had not really been tested; the machine was to be delivered "complete in everything for working:" *Held*, that there was no warranty, express or implied, that the machine was adapted to the use of prospecting. *Id.*

11. *Sale of "all interest" of vendor—No implied warranty*.—Articles under seal were entered into, intending that the vendor agreed to sell all his right, title and interest, in a certain oil lease, in consideration whereof the purchaser agreed to pay \$1,000. Vendor further agreed to sell "all his interest," in another lease for which the purchaser agreed to pay \$1,500. The vendor had no formal lease upon either premises, but was in possession under agreements. The purchaser knew the state of the title: *Held*, 1st, that the subject-matter being chattel property, the articles of agreement between the parties amounted to a conveyance of the premises; 2d, that vendee having accepted such conveyance, limited in terms to the interest of the vendor, and containing no covenants of warranty, the vendor could not be held responsible for not having a greater interest in the property and no warranty of title could be implied. *Johnston v. Mendenhall*, 101

12. *Where a sale is limited in terms to such interest as the vendor*

WARRANTY. *Continued.*

has, without warranty, the transaction being free from fraud or concealment, a defect in the vendor's title can not defeat a suit for purchase money. *Id.*

13. *The rule in regard to warranty on sale of leasehold interests*, such as are required to be transferred by deed, is the same as in cases of real estate. *Id.*

WASTE.

1. *Waste against executors.*—If lessee devise his term and die, and then his executors do waste, and afterward assent to the devise, an action of waste in the *t. n. u.* lies against the executors. *Saunders' Case*, 109

2. *Threats to commit waste—Injunction.*—The court of chancery has jurisdiction to stay waste in opening mines where the defendant has threatened to open them and insists upon his right so to do. *Gibson v. Smith*, 111

3. *Tenant in dower working underlying seams.*—It is not waste in a tenant in dower of coal lands to take coal, to any extent, from a mine already opened, or to sink new shafts into the same veins of coal. The tenant may penetrate through a seam already opened and dig into a new seam that lies under the first. *Crouch v. Puryear*, 113

4. *Reasonable and necessary use.*—The statutes of Pennsylvania in relation to waste forbid to tenants for life such acts as at common law constitute waste, except they be such as in the judgment of the Common Pleas, and according to the terms of the act of 1848 are requisite to "reasonable and necessary use and enjoyment," of the estate. *Irwin v. Corode*, 120

5. *Working open mines.*—At common law the working of open mines by tenant for life is not waste; and in Pennsylvania, whilst the right of possession is unquestioned, the working of open mines by a tenant for life is not waste. *Id.*

6. *Exhaustive mining allowed.*—Though a court, by virtue of its common law powers, might restrain unskillful mining and wanton injury to the inheritance by a tenant for life, yet not such mining as is subject to no other objection than its liability to exhaust the mine. *Id.*

7. *Waste not presumed.*—To charge a tenant for life with waste committed to the injury of the remainderman, the evidence must affirmatively show that the acts complained of constitute waste; the presumption is in favor of the tenant for life. *Lynn's App.*, 126

8. *Tenant for life committing waste.*—When a tenant for life impeachable for waste, improperly, knowingly and wilfully commits waste, he can not derive any benefit from the timber cut. *Bagot v. Bagot*, 130

9. *Waste, no subject of mandamus.*—If one who is entitled to an order to stay waste does not seek it in an affirmative suit at law, or in equity, he has no remedy for its refusal. *People v. The Circuit Judge*, 142

10. *Presumptions as to authority for working the quarry.*—Where it is proved that a quarry was worked, and that there was a lease which would authorize the workings, it will be presumed, after a great lapse of time, that the workings took place under the lease, and the burden of proof will lie on a party who seeks to show that they were unauthorized. *Elias v. Snoudon Slate Co.*, 143

WASTE. *Continued.*

11. *What is a sufficient opening of a quarry*, considered on the facts of the case. *Id.*

12. *If a mine has been worked for commercial profit*, that is ordinarily decisive proof of the right to continue working; taking minerals for some restricted purpose would not give such right, but the fact of commercial sale is not necessarily a criterion of the difference between an open and an unopened mine. *Id.*

13. *Cesser of work distinguished from abandonment*.—Mere cessation of work though never so long continued will not defeat the tenant's right to work; but an abandonment for a day with an executed intention to devote the land to other uses would be fatal to the claim of the right to work on behalf of the tenant for life. *Gaines v. Green Pond M. Co.*,
153

14. *New pits may be sunk upon veins already opened*. *Id.*

See INJUNCTION, 1, 3; MORTGAGE, 1.

WATER.

1. *Right to reclaim escaped water*.—Plaintiffs had dammed and appropriated the waters of Shady Creek. Afterward defendants constructed a ditch by which the waters of Grizzly Canon and Bloody Run were diverted to a point where they utilized it for mining. After using, it was allowed to find its way into Shady Creek above the plaintiffs' dam. Defendants claimed the right to tap Shady Creek above plaintiffs' dam and re-take as much water as escaped from their works: *Held*, that they had lost all right to the escaped water and could not reclaim it, and that the enjoyment of the right, if conceded, would be impracticable. *Eddy v. Simpson*,
175

2. *Usufruct in water*.—The right to water is usufructuary; it is not in the *corpus* of the water, and continues only during possession. *Id.*

3. *The right to divert water from its natural streams* has been recognized by the State legislation of California, and by the tacit assent of the Federal Government. *Irwin v. Phillips*,
178

4. *Rights of prior appropriator of water*.—The prior appropriator of a stream of water for mining purposes has a right to have the water flow down above the point of his appropriation without interruption or diminution in quantity. *Phoenix W. Co. v. Fletcher*,
185

5. *Failure to plead adverse use of water*.—The party claiming a right to the use of water by adverse possession, must set up the same as a defense in his answer; and if he does not, he loses the right to introduce evidence in support of it, and to have the court instruct the jury in relation to it. *American Co. v. Bradford*,
191

6. *Enjoined diverter may tap below*.—A decree enjoining the owners of a mining claim, situate on a creek below a dam at the head of a ditch, from diverting any water from or in any manner interfering with the waters of the creek that rise above the dam, does not prevent the owners of the mining claim from using the waters of the creek which may flow down the same after the ditch is supplied. *Id.*

7. *The intended user of the water by one who diverts it is not material*. *Van Sickle v. Haines*,
201

WATER. *Continued.*

8. *Miner's inch treated as uncertain, in verdict.*—When, in an action to determine plaintiff's rights in the water of a certain creek, the complainant averred that he was entitled to 500 inches "measured under a four-inch pressure," and the jury found that he was entitled to forty inches, "miners' measurement:" *Held*, that the verdict was so uncertain as to necessitate reversal. *Dougherty v. Haggin*, 211

9. *Damages from percolating water* are an injury for which no redress can be granted. *Lord v. Carbon Iron Co.*, 696

See ADVERSE POSSESSION, 1, 2; APPROPRIATION; DAM; FLOODING; HYDRAULICS; MEASURE OF DAMAGES, 8; PATENT, 2; SPRINGS.

WATER-COURSE.

1. *Artificial water-course—User.*—In the case of an artificial water-course, made for a particular and temporary purpose, its water having been originally taken with notice that it might be discontinued, and the circumstances not being such as to afford any presumption of a grant by the owners of certain mines, the lessee of the owner of the land through which the water-course was made was held not to have acquired by user any perpetual right to the uninterrupted continuance of the water-course. *Arkwright v. Gell*, 162

WAY.

1. *Test of what is a "necessary" or "convenient" way.*—Where the right exists to get the minerals under land, and for that purpose has been granted the right to construct "necessary" or "convenient" ways, the test of the proper exercise of such right is "whether the direction chosen has been such as a person of reasonable and ordinary skill and experience would have selected beforehand, and whether the mode adopted has been such as a prudent and rational person would have adopted if he had been making the road upon his own land and not upon the land of another." *Abson v. Fenton*, 215

2. *"Railway" covers steam railway—Compensation acts apply to future owners.*—By an act of 32 Geo. III for making a canal, the "owners or proprietors of any mines of coal" within certain parishes, were empowered to make any railways or roads to convey their coals, etc., to the said canal, over the lands or grounds of any person or persons, paying or tendering satisfaction, etc., for the damage to be thereby occasioned: *Held*, that this power was not limited to persons who were proprietors at the time of the passing of the act or of the making of the canal, but extended to other persons who had become such since, and that such owners or proprietors were empowered to make railroads to be traversed by locomotive engines. *Bishop v. North*, 220

3. *Carriage of foreign minerals.*—A lease of waste land of a manor contained a reservation to the lessor of the mines and quarries, with full power to win and work the same with free way leave and passage to, from and along the same, on foot or on horseback, with all manner of carriage, and a covenant by the lessor that in working the mines he would do as slight damage as possible to the soil, etc.: *Held*, that the lessor and those claiming under him were entitled not merely to a right of way for the purpose of working the reserved minerals, but to an absolute way

WAY. Continued.

leave which might rightfully be used for the purpose of working minerals not under the demised property. *Proud v. Bates*, 227

4. *Right of way by tunnel—Statute cumulative to custom.*—The statute of 1870, providing for the condemnation of a right of way for ditches, flumes, tunnels, etc., over or through mining claims, is cumulative and does not prevent the enforcement of a similar right where existing by virtue of the local customs of miners. *Bliss v. Kingdom*, 239

WEIGHTS AND MEASURES.

1. *Contract presumed made with reference to statute.*—Where a contract was made for a given number of tons of pig metal after the passage of the act April 15, 1854, which declares that 2,000 pounds shall make one ton, the contract must be taken as made with reference to it; and it was error to allow local custom to control the statute. *Evans v. Myers*, 243

2. *Statute controls custom.*—Local customs can not nullify acts creating a uniform system of weights and measures. *Id.*

3. *Lessee confined to screen in use at date of lease.*—Where a mining lease provided that the lessees should pay a certain sum per bushel "for all screened coal," and at the time of the lease there was but one screen in use at the mine leased, and but one screen in common use in other mines in the locality, and afterward the lessees placed over the screen then in use a second screen, with larger meshes: *Held*, that the parties must be held to have contracted with reference to the state of things existing at the time the lease was made; that the words "screened coal" meant such coal as passed over the single screen then in use; and that the lessees must pay the price stipulated for all the coal that passed over the lower as well as the upper screen. *Williams v. Summers*, 246

4. *Statutory modes of weighing exclusive.*—Where a statute provides that miners shall be paid according to weight of mineral got, and provides further how that weight shall be ascertained and for deductions for slack, miners can not be held to contracts providing for other and different modes of weighing. *Bourne v. Netherseal Colliery Co.*, 691
See COAL, 1; MASTER AND SERVANT, 4; WATER, 8.

WITNESS.

1. *Witness—Criticism of, from the bench.*—In regard to a certain witness, the court instructed the jury as follows: "I can scarcely believe that any jury would be willing to accept the testimony of a witness who would declare, upon the stand, that he had made statements in a general way, and for business purposes, outside of the court room, and with a view to defraud people with whom he was carrying on negotiations, in opposition to his testimony on the stand." *Hyman v. Wheeler*, 520

WORKINGS.

1. *Covenant to work undiscovered mines, when discovered, in workmanlike manner.*—Plaintiff demised to the defendant all mines and beds of coal, which then had been, or thereafter during the demise should be, discovered or opened under certain lands, at a yearly rent to be paid whether any coal should be worked or not, together with 7d. per ton for every ton raised. Defendant covenanted that he would at all times during the demise work the said mines in a proper and workmanlike man-

WORKINGS. *Continued.*

ner. *Breach*, that the defendant did not work the said mines in a proper and workmanlike manner, but, on the contrary, permitted the mines to lie, and the same were wholly ungotten. *Plea*, that the said mines were never, at any time since or during the demise, worked or gotten, nor did he, the defendant, at any time since or during the demise, work or get the mines: *Held*, on demurrer, that inasmuch as it appeared by the pleadings that the mines had not been worked at all, the defendant was not liable on this covenant for not working them in a workmanlike manner, the subject-matter of demise being, not all the mines under the lands specified, but only such as either had been or should be discovered or opened. *Quarrington v. Arthur*, 255

2. *Instroke*.—A provision in the lease of a coal bank that the lessee shall be treated as having abandoned his lease, if he shall suffer the bank by any fault of his, to lie idle for a year when it would yield coal, does not apply if he be actually taking coal out of the bank by any means of access leading to the coal. *Tiley v. Moyers*, 259

3. *Letting down the roof of a coal mine*, so as to prevent access to barriers of coal left: *Held*, not a ground of complaint where the barriers were not left for the purpose of being worked, but to prevent water coming in from an adjoining mine, *Shafte v. Johnson*, 262

4. The words "proper and workmanlike manner" admit of the evidence of experts, for no court can be so informed upon the subject of mining as to know what is a "proper and workmanlike manner." The extreme views of this phrase stated. *Lewis v. Fothergill*, 271

5. *Power to legislate to protect workmen*.—The legislature has the power to establish reasonable police regulations for the working of mines, for the protection of the workmen employed therein; and the act requiring underground map of the colliery to be kept is not unconstitutional. *Daniels v. Hilgard*, 280

6. *For damages resulting from natural causes*, or from lawful acts done in a proper manner, the law gives no redress, but when one of two adjoining mine owners conducts water into his neighbor's mine, which would not otherwise go there, or causes water to go there at different times and in quantities larger than it would naturally go there, he is answerable for the damages. *Lord v. Carbon Coal Co.*, 696

7. *Each owner must protect himself*.—One of the experts testified: "It is customary to make a dam whenever necessary. The rule all work by is for each person to protect his own mine against others;" and the opinion of the court seems to adopt this language as correctly stating the rule. *Jones v. Robertson*, 703

8. *The upper owner may bulk-head*, using ordinary care and skill, and will not be liable for the consequences of an ultimate break and flood. *Id.* See *INSTROKE*, 1, 2; *SURFACE SUPPORT*.



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